SMU | DEDMAN SCHOOL OF LAW

SMU Law Review

Volume 54
Issue 5 *Special Issue (pages 1691-1906)*

Article 5

2001

Reexamining the Right to Trial by Jury

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REEXAMINING THE RIGHT TO TRIAL BY JURY

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> There is nothing to prevent . . . invasion of the jury's province except the self-restraint of the judges themselves. It is simply an institutional risk. Where impulses are so strong to do ultimate justice, and where the jury and what its members heard, observed and considered are so far removed from the chambers of the court, the brakes of self-restraint are severely taxed. The supreme power in a court

* Chief Justice John and Lena Hickman Distinguished Faculty Fellow and Professor of Law, Southern Methodist University School of Law, Dallas, Texas. Helpful advice, comments and useful suggestions were provided by my friends and colleagues, Beth Thornburg, C. Paul Rogers, and Thomas C. Wright. Dedman Law students Tom M. Dees and Wilson S. Gravitt also provided diligent and valuable assistance.

system as in any other hierarchy inevitably increases with its exercise.[1]

[T]he best way to do justice in the long run is to confine to a minimum appellate tampering with the work of the trial courts.[2]

I. INTRODUCTION

IN the federal system, the right to trial by jury in civil matters is provided for in the Seventh Amendment to the United States Constitution.[3] Although the Seventh Amendment does not apply in state court, the same right to trial by jury is established, protected, and preserved by constitution, by statute, or by a procedural rule in every one of the United States.[4] Of the right to trial by jury, Thomas Jefferson asserted: "I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution."[5] The colonists regarded the right to trial by jury as so important that they listed preclusion of it in the Declaration of Independence as an explicitly offensive act by the English: "[f]or depriving us in many [c]ases, of the [b]enefits of [t]rial by [j]ury."[6] Similarly, United States Chief Justice William Rehnquist has reasoned: "[t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."[7] Alexis de Toqueville considered "[t]he system of the jury, as it is understood in America, appears to me to be as direct and as extreme a consequence of

1. Leon Green, *Jury Trial and Proximate Cause*, 35 TEXAS L. REV. 357, 358 (1957).

2. Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 782 (1957).

3. U.S. CONST. amend. VII. *See also* U.S. CONST. amend. VI (providing the right to trial by jury for criminal matters); U.S. CONST. amend. V (providing for criminal grand juries).

4. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996); *see also* Walker v. Sauvinet, 92 U.S. 90, 92 (1876). The fact that the Seventh Amendment does not extend to state court proceedings is of key importance that each state supreme court decides the nature of the right and the extent to which verdicts may be reexamined. *See, e.g.*, State v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288, 291 (Tex. 1975) (interpreting TEX. CONST. art. 1, § 15 ("The right of trial by jury shall remain inviolate") and TEX. CONST. art. 5, § 10 (extending the right to "trial of all causes in the District Courts")); Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 185, n.10 (2000). Two states—Louisiana and Colorado—do not constitutionally guarantee the right to trial by civil jury, but rather do so by either statute or court rule. *See* LA. CODE CIV. P. ANN. arts. 1731, 1732 (West 1990) (providing a right to a civil jury trial, with certain exceptions such as in suits against a state agency or certain suits to enforce an unconditional obligation for a specific sum of money); COLO. R. CIV. P. 38; State Farm Mut. Auto. Ins. Co. v. Broadrax, 827 P.2d 531, 537 (Colo. 1992) (trial by jury in civil case is not matter of right under Colorado constitution).

5. 3 THE WRITINGS OF THOMAS JEFFERSON 71 (Washington ed. 1861).

6. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776). *See also* 11 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 109-10 (1966) (explaining the expansion of the British courts of admiralty and vice-admiralty's jurisdiction to include civil matters, which, in turn, denied defendants the right to trial by jury).

7. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

the sovereignty of the people, as universal suffrage."[8] Modern commentators generally agree with these views.[9]

Although culturally we are much in favor of the right to trial by jury as a safeguard against tyranny, the right has been endangered by a series of recent developments.[10] The good news is that the right to a meaningful and binding determination of controlling issues by jury has been surprisingly resilient, despite these developments. The bad news is that the legal profession, and particularly the academic community, has paid scant attention to the manner in which juries participate in the litigation process. More often than not, the focus of legal discussion and legal training, based largely on published court opinions, is on "who should win" rather than on "who should decide" litigious controversies. In this respect, we have lost our compass and placed one of our most important rights in jeopardy.[11] Perhaps foremost among the reasons for this trend has been our preoccupation with the Seventh Amendment's guarantee of the right to a jury trial at the expense of that amendment's prohibition against judicial reexamination of the jury's findings of fact other "than according to the rules of the common law."[12]

The purpose of this article is to emphasize the reexamination clause and how it functions to protect the jury's province from invasion. Fundamental to the notion of the jury's province are the jury's right to decide mixed questions of law and fact, and the jury's right to draw inferences from the evidence. This article focuses on the Supreme Court's recognition of the importance of these two jury rights—particularly the latter—

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8. ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 310 (Francis Bower trans., Alfred A. Knopf 1976) (1840).

9. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991) ("The jury summed up–indeed embodied–the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights."); AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 52 (1998) ("To the Framers, the value of the jury derived more profoundly from another consideration: the role of ordinary citizens in thwarting various forms of government oppression, corruption, and self-dealing."); *id.* at 55 ("It is almost impossible to exaggerate the jury's importance in the constitutional design. No idea was more central to the Bill of Rights–indeed, to America's distinctive regime of government of the people, by the people, and for the people."); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 617 (2000) ("Thus, it is not an exaggeration to say that 'the entire issue of a Bill of Rights was precipitated at the Philadelphia Convention by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases.'") (quoting Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 657 (1973)).

10. *See* Phillip D. Hardberger, *Juries Under Siege*, 30 ST. MARY'S L.J. 1 (1998); Mark Curriden, *Putting the Squeeze on Juries*, 86 A.B.A. JOURNAL 52 (August 2000); Mark Curriden, *Deliberate Influence: Juries are Increasingly Using Verdicts to Demand Change, Make Statements*, DALLAS MORNING NEWS, June 25, 2000, at 1A; Mark Curriden, *Right to Trial by Jury Gets Boost from Court*, DALLAS MORNING NEWS, Jan. 11, 2001, at 1A; William Glaberson, *Juries, Their Powers Under Siege, Find Their Role Is Being Eroded*, N.Y. TIMES, Mar. 2, 2001, at A1.

11. *See, e.g.*, Galloway v. United States, 319 U.S. 372, 397 (1943) (Black, J., dissenting) (noting the "gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.").

12. U.S. CONST. amend. VII.

in recent jurisprudence and the circuit courts' interpretations of the high Court's decisions. In so doing, this article explains how a recent Supreme Court decision requires a reassessment of the common understanding of current federal summary judgment principles. The article also addresses weight-of-the-evidence review and explains its relationship to legal sufficiency review and to the reexamination clause. As a whole, the theme of the article is that although appellate courts may review jury verdicts to ensure they are supported by legally and factually sufficient evidence, their methods of review must be consonant with the substance and the spirit of the Seventh Amendment.

II. THE ESSENCE OF THE RIGHT

The Seventh Amendment provides: "In suits of common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried to a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."[13] Although academic focus has been more heavily concentrated on the existence of the right to trial by jury under the first clause of the Seventh Amendment, the essential character of the right is more directly addressed in the reexamination clause. It is for this reason, no doubt, that Justice Story characterized the clause as "more important" than the remainder of the Seventh Amendment.[14]

From the standpoint of modern litigation practice conducted in both state and federal courts, the two most important attributes of the right to trial by jury are: (1) the right of the parties to have the jury decide mixed questions of law and fact,[15] and (2) the right of the parties to have the jury draw inferences from the evidence.[16] These rights give substance to the reexamination clause and analogous state law jury trial provisions,

13. *Id.*

14. Parsons v. Bedford, 28 U.S. 433, 447-48 (1830) ("This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the Court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate Court, for some error of law which intervened in the proceedings. The judiciary act of 1789, ch. 20, sec. 17, has given to all the Courts of the United States 'power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the Courts of law.' And the appellate jurisdiction has also been amply given by the same act (sec. 22, 24) to this Court, to redress errors of law; and for such errors to award a new trial, in suits at law which have been tried by a jury."). *See also* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) (holding that the reexamination clause "not only preserves that right [to trial by jury] but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of reexamination existing under common law"); Walker v. New Mexico & S.P.R. Co., 165 U.S. 593, 596 (1897).

15. *See* William V. Dorsaneo, III, *Broad-Form Submission for Jury Questions and the Standard of Review* 46 SMU L. REV. 601 (1992); *see also* Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 676-85 (1949).

16. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986) ("If reasonable minds could differ as to the import of the evidence . . . a verdict should not be directed." (citing Wilkerson v. McCarthy, 336 U.S. 53, 62 (1949)); Lavender v. Kurn, 327 U.S. 645, 652 (1946).

and, more generally, to the entire subject of the relationship of judges, juries, and reviewing courts.[17] The first important right is the right to have a jury decide whether the defendant's conduct violated or conformed to the applicable legal standard, rather than the more basic factual questions about "what happened." The second right—the power of the jury to draw inferences from the evidence in deciding whether the applicable legal standard was violated, whether the defendant's conduct caused the occurrence in question, or the extent of a claimant's injuries and damages—is the most critical component of the right to trial by jury. If the inferences drawn by the jury could be cast aside by trial judges or appellate courts merely because the judges regard the jury's inferences, as reflected in the verdict form, as less convincing or reasonable than competing inferences, the right to trial by jury would be rendered considerably less meaningful.

Recent debate about the right to trial by jury has been mired in a mass of technical details. As this article explains, for good or ill, after many years of leaving the circuits to their own devices, the Supreme Court has now clearly turned its attention to the subject of reexamination.

III. EVIDENTIARY REVIEW AND THE SUPREME COURT

A. THE *REEVES* DOCTRINE

The most important Supreme Court decision concerning reexamination of jury verdicts is *Reeves v. Sanderson Plumbing Products, Inc.*[18] Although the *Reeves* opinion does not mention the reexamination clause, the Court's opinion prescribes the proper method of judicial review of jury verdicts and fact findings.

Reeves was brought under the Age Discrimination in Employment Act (ADEA).[19] Reeves contended that he was fired because of his age in violation of the ADEA.[20] His employer, Sanderson Plumbing Products, Inc., contended that Reeves was fired because of his failure to keep accurate attendance records for employees under his supervision.[21] Reeves presented evidence that he had in fact not kept shoddy records and that the company's reason for terminating him was pretextual.[22] This evidence included testimony concerning certain age-based comments about him by company officials.[23]

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17. *See* William V. Dorsaneo, III, *Judges, Juries and Reviewing Courts*, 53 SMU L. REV. 1497 (2000) [hereinafter Dorsaneo, *Judges and Juries*]; LEON GREEN, JUDGE AND JURY Chs. 13-15 (1930); FLEMING JAMES JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE Ch. 7 (1992).

18. 530 U.S. 133 (2000).

19. 81 Stat. 602, as amended, 29 U.S.C. § 621 et. seq.

20. *Reeves*, 530 U.S. at 138.

21. *Id.*

22. *Id.*

23. *Reeves*, 530 U.S. at 151. Reeves testified that Chesnut, the person who was the actual decision maker behind his firing, had told him that he "was so old [he] must have come over on the Mayflower" and on another occasion that he "was too damn old to do [his] job." *Id.*

During trial, the district judge denied two defense motions for judgment as a matter of law under Federal Rule of Civil Procedure 50[24] and submitted the case to the jury. Among other things, the trial judge instructed the jury that "[i]f the plaintiff fails to prove age was a determinative or motivating factor in the decision to terminate him, then your verdict shall be for the defendant."[25] The jury returned a verdict for Reeves and awarded him damages.[26]

The Court of Appeals for the Fifth Circuit reversed.[27] Although the circuit court's *per curiam* opinion states candidly that Reeves "very well may" have offered sufficient evidence for "a reasonable jury [to] have found that [the company's] explanation for its employment decision was pretextual," this evidence was "not dispositive" of the ultimate issue—"whether Reeves presented sufficient evidence that his age motivated [the company's] employment decision."[28] Based on the company's evidence that the age-based comments "were not made in the direct context of Reeves' termination," the fact that two of the decisionmakers involved were over the age of fifty, and that several of the company's management positions were filled by persons over age fifty, the circuit court panel concluded that Reeves had not introduced sufficient evidence.[29]

The Supreme Court, however, reversed.[30] The Court specifically held that in an age discrimination case, a *prima facie* case of discrimination,[31] and sufficient evidence for the fact finder to reject the employer's explanation as a pretext and unworthy of belief, may preclude rendition of judgment against the claimant as a matter of law, even though the plaintiff does not introduce any independent and additional evidence of willful discrimination.[32] The Supreme Court also held that the court of appeals panel[33] misapplied the legal sufficiency standard of review by substituting the panel's judgment for the jury's verdict, presumably because the court of appeals panel liked the defendant's evidence more.[34] The Supreme Court explained that the court of appeals panel disregarded critical evidence supporting the petitioner's *prima facie* case, discounted the evidence challenging the employer's explanation for its decision to discharge Reeves, failed to draw all reasonable inferences in his favor, and treated

24. FED. R. CIV. P. 50.
25. *Reeves*, 530 U.S. at 138-39.
26. *Id.* at 139.
27. *See* Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 694 (5th Cir. 1999).
28. *Id.* at 693.
29. *Id.* at 693-94
30. *Reeves*, 530 U.S. at 154.
31. In an ADEA discharge case, a *prima facie* case of discrimination is established if the plaintiff shows that he or she was: (1) discharged; (2) qualified; (3) within the protected class at the time of discharge; and (4) either replaced by someone outside the class or someone younger, or otherwise discharged because of age. *See* Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993).
32. *Reeves*, 530 U.S. at 148.
33. The circuit court of appeals panel, which produced a *per curiam* opinion, consisted of Circuit Judges Patrick E. Higginbotham, Edith Hollan Jones, and Jacques L. Wiener. *Id.* at 149.
34. *See id.* at 153.

the employer's rebuttal evidence that Reeves' age did not motivate its employment decision as dispositive, thereby substituting the panel's judgment concerning the weight of the evidence for the jury's verdict.[35]

Significantly, the *Reeves* Court addressed, and for the most part resolved, longstanding differences among the courts of appeals on the issue of the scope and standard of appellate review of fact findings.[36] The Court explained that some decisions "have stated that review is limited to the evidence favorable to the nonmoving party[37] while most hold that review extends to the entire record."[38] But the Court regarded this distinction as "more semantic than real" and explained that while review of all of the evidence is required to determine a motion for judgment as a matter of law, the trial judge is required to give credence only to the evidence and reasonable inferences that tend to support the finding and to disregard all contrary evidence the jury was not required to believe.[39]

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35. *See id.* (In holding that the record contained insufficient evidence to sustain the jury's verdict, the Court of Appeals misapplied the standard of review. . . . The court disregarded critical evidence favorable to petitioner–namely, the evidence supporting petitioner's *prima facie* case and undermining respondent's nondiscriminatory explanation. *See* Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 693-94 (5th Cir. 1999). The court also failed to draw all reasonable inferences in favor of petitioner. For instance, while acknowledging "the potentially damning nature" of Chesnut's age-related comments, the court discounted them on the ground that they "were not made in the direct context of Reeves's termination." *Id.* at 693. And the court discredited petitioner's evidence that Chesnut was the actual decisionmaker by giving weight to the fact that there was "no evidence to suggest that any of the other decision makers were motivated by age." *Id.* at 694. Moreover, the other evidence on which the court relied–that Caldwell and Oswalt were also cited for poor recordkeeping, and that respondent employed many managers over age 50–although relevant, is certainly not dispositive . . . . In concluding that these circumstances so overwhelmed the evidence favoring petitioner that no rational trier of fact could have found that petitioner was fired because of his age, the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's.).

36. *See* Schwimmer v. Sony Corp. of America, 459 U.S. 1007, 1009 (1982). Justice White's dissent from the denial of *certiorari* explained that the circuit courts applied different and conflicting review standards in performing the important task of assessing the probative value of evidence supporting jury verdicts. As Justice White explains:

> [I]t is the Second Circuit's practice to examine all of the evidence in a manner most favorable to the nonmoving party. This is also the position of at least the Fifth and Seventh Circuits. . . . In the Eighth Circuit, however, it appears that only evidence which supports the verdict winner is to be considered. . . . The First and Third Circuits follow a middle ground: the reviewing court may consider uncontradicted, unimpeached evidence from disinterested witnesses.

Id.

37. *Reeves*, 530 U.S. at 149 (citing Aparicio v. Norfolk & Western Ry. Co., 84 F.3d 803, 807 (6th Cir. 1996); Simpson v. Skelly Oil Co., 371 F.2d 563, 566 (8th Cir. 1967)).

38. *Id.* (citing Tate v. Gov't. Employees Ins. Co., 997 F.2d 1433, 1436 (11th Cir. 1993); Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)).

39. *See id.* at 150. ("On closer examination, this conflict seems more semantic than real. Those decisions holding that review under Rule 50 should be limited to evidence favorable to the nonmovant appear to have their genesis in Wilkerson v. McCarthy, 336 U.S. 53 (1949). *See* 9A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2529, 297-301 (2d ed. 1995). In *Wilkerson*, we stated that 'in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of' the nonmoving party. *Wilkerson*, 336 U.S. at 57. But subsequent decisions have clarified that this passage was referring to the evidence to which the court should *give credence*, not the evidence that the court

This means that the reasonableness of inferences involves a consideration of the evidence as a whole, but not that a reviewing court may make credibility determinations or weigh the evidence.

The high Court's most critical language concerning the method of legal sufficiency review states that:

> [T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.[40] "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[41] Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.[42] That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that [it] comes from disinterested witnesses.'[43]

Hence, the Court makes it very clear that it is the jury's role to draw reasonable inferences from the evidence and that any judge or court reviewing the record to determine whether legally sufficient evidence supports a verdict must disregard all direct and circumstantial evidence contrary to the verdict that the jury was not required to believe.

B. UNDERSTANDING THE *REEVES* DOCTRINE

1. *The Basic Two-Step Method of Whole-Record Review*

a. Academic Misinterpretations

The Court's language is clear that reviewing courts are required to disregard all evidence and inferences that are contrary to the verdict or finding under review, except for evidence the jury is required to believe.[44] Nevertheless, several commentators[45] have expressed the view that the *Reeves* decision actually validates a method of "whole-record" eviden-

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should *review*. In the analogous context of summary judgment under Rule 56, we have stated that the court must review the record "taken as a whole." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). And the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, such that "the inquiry under each is the same." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.).

40. *Id.* (citing Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-55 (1990); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986); Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 n.6 (1962)).

41. *Id.* at 150-51 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

42. *Id.* at 151 (citing C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2529, 299).

43. *Reeves*, 530 U.S. at 151 (quoting C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2529, 300)).

44. *See id.* at 151.

45. Steven Alan Childress, *Jury Verdicts: The Whole Greater Than Pieces*, 53 SMU L. REV. 1539, 1543 (2000); STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 3.03 (Supp. 2000) [hereinafter CHILDRESS & DAVIS]. Even the Asso-

tiary review, supposedly applied in reviewing jury verdicts on appeal by a majority of the circuits,[46] and under which the evidence and inferences that support the verdict are evaluated through the prism of the record as a whole, including unfavorable evidence and inferences.

The primary reason for this interpretive phenomenon is that the Court's outright rejection of an aggressive form of whole-record review is downplayed in the *Reeves* opinion and characterized as "more semantic than real."[47] Another important reason for this academic misperception is the Supreme Court's clear statement that the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law in jury-tried cases[48] without a clear explanation that the adoption of the *Reeves* approach requires a reconsideration of the Supreme Court's most important summary judgment opinions[49] and a re-analysis of federal summary judgment practice.[50] It is also undeniable, however, that some of the academic commentary and literature regards the jury with skepti-

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ciation of American Law Schools' Fall 2000 Civil Procedure Section Newsletter mistakenly or misleadingly describes *Reeves* as follows:

> In *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000), the Supreme Court held that in ruling on a judgment as a matter of law, a court must review all the evidence, not just the evidence favorable to the non-moving party. The case involved an age discrimination claim. At trial, plaintiff presented sufficient evidence to meet the requirements for a *prima facie* case. He also introduced evidence that his employer's proffered non-discriminatory explanation for the firing was pretextual. The jury returned a verdict for the plaintiff and the trial court entered judgment in his favor, refusing to enter a JMOL.

The Fifth Circuit reversed, holding that although plaintiff had stated a *prima facie* case and also had sufficient evidence from which a jury could conclude that employer's explanation was pretextual, these were not sufficient to meet the plaintiff's burden of proving that he was fired because of his age. The Supreme Court reversed. It held that proof that the defendant's explanation is not credible is "one form of circumstantial evidence that is probative of intentional discrimination." The Court then discussed what evidence a court was permitted to consider in ruling on a motion for JMOL. The Court rejected the approach, articulated by some courts, that review is limited to evidence favorable to the nonmoving party. Instead, the court reiterated that the standard for summary judgment mirrors that for JMOL and that in both situations, the court should review all of the evidence in the record.

By failing to note that the *Reeves* decision requires judicial reviewers to give credence to evidence and inferences supporting the verdict and to "disregard all [unfavorable] evidence," the Civil Procedure Section's Newsletter gets *Reeves* exactly backwards!

46. *See, e.g.*, Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969). *Boeing* is generally regarded as the embodiment of "whole record" review. Professors Childress and Davis treat *Boeing* as emblematic of a majority of the circuits. *See* CHILDRESS & DAVIS, *supra* note 45, § 3.03, at 3-24; 3-26. As explained below, however, the *Boeing* decision presents its own interpretive difficulties. *See infra* text accompanying notes 138-143. Furthermore, it is probably unwise, if not impossible, to make general statements about majority and minority rules in this particularly contentious context.

47. *Reeves*, 530 U.S. at 150.

48. *Id.* at 150-51 (citing Anderson v. Liberty Lobby, Inc. 497 U.S. 242, 250-51 (1986)).

49. *See infra* text accompanying notes 110-30.

50. For a critical review of modern summary judgment practice, see Samuel Issacharoff & George Leowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990) and Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988).

cism, if not outright hostility, and that certain writers would regard the *Reeves* standard, properly interpreted, as too deferential.[51]

b. The Appropriate Interpretation

A clear understanding of the Court's opinion in *Reeves* dictates how whole-record review is properly conducted. First, the whole record is reviewed to identify the direct and circumstantial evidence[52] favoring the party with the burden of proving a particular issue as well as the limited range of evidence the fact finder is required to believe or credit.[53] In the context of circumstantial evidence, this means that a reviewing court must determine from the evidence as a whole whether reasonable inferences can be drawn from the circumstantial evidence in support of the proponent's issue and what those inferences are.[54]

Second, based on the evidence and inferences favorable to the proponent of an affirmative finding on an issue, a reviewing court must test the sufficiency of the evidence by "giving credence"[55] only to the evidence that supports an affirmative finding on the proponent's issue and the undisputed evidence the jury was required to believe.[56] By definition, this means that evidence contrary to the finding that the jury was not required to credit, and even reasonable inferences in derogation of the finding are not given credence and otherwise should not be part of the second step in the evaluative process.[57]

The primary reason for this two-step method of whole-record review is for reviewing courts to avoid the temptation to weigh the evidence and make credibility determinations in cases involving conflicts in the direct evidence. On a more subtle level, the two-step approach recognizes and validates the companion principle that drawing legitimate inferences from the facts is a jury function, not a job for judges.[58] Because the circumstantial evidence will frequently provide a reasonable basis for draw-

51. *See, e.g.*, Martin Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023 (1989); William Powers, *Judge and Jury in the Texas Supreme Court*, 75 TEXAS L. REV. 1699, 1719 (1997).

52. As used in this article, circumstantial evidence means the facts and circumstances surrounding an event or transaction from which the factfinder may draw reasonable inferences about whether the applicable legal standard was violated, whether the defendant's conduct caused the occurrence, extent of a claimant's injuries and damages, or about the truth or existence of some other matter. *See* BALLENTINE'S LAW DICTIONARY 201 (3d ed.); 29 Am. Jur. 2d Evidence § 313 (1994); *Cf.* BLACK'S LAW DICTIONARY 576 (7th ed. 1999).

53. *See infra* text accompanying notes 57-61.

54. For a discussion of how the reasonableness of an inference must be evaluated, *see infra* text accompanying notes 62-104.

55. *See Reeves*, 530 U.S. at 150.

56. *Id.* at 151.

57. In other words, unfavorable evidence and inferences should not be argued to a trial or appellate court as a basis for the rendition or review of a judgment as a matter of law based on the legal insufficiency of the evidence to raise a jury question on a particular issue.

58. *Reeves*, 530 U.S. at 150-51 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1980)).

ing legitimate but conflicting inferences about a particular issue,[59] a consideration of both favorable and unfavorable inferences would require a reviewing court to identify and then overlook its own view about which reasonable inference is the most convincing. This approach simply expects too much from reviewers.

The better view on the basis of policy and precedent is that if the circumstantial evidence will support more than one reasonable inference, it is for the jury to decide which one is more convincing or more reasonable.[60] The reviewing court's focus should be restricted to an evaluation of the reasonableness of the favorable inference, a matter that does not require the consideration of competing reasonable inferences.[61]

Properly applied, whole-record review is conducted to identify the direct evidence and reasonable inferences that can be drawn from the circumstantial evidence that supports the challenged fact or finding, so this evidence can be evaluated under the substantive legal principles that are applicable to the case. Once this has been done, it is not necessary to reconsider contrary evidence or contrary inferences that the jury could have credited or reasonably drawn from the evidence, but was not required to credit or draw from the circumstantial evidence. In fact, reexamination of the evidence will inevitably lead a reviewing court to a consideration of whether an inference rejected by the jury is equally or, indeed, more probable than the jury's finding or verdict, thereby defeating the basic principle that a reviewing court must not weigh the evidence.

2. *Who and What is the Jury Required to Believe?*

The subject of "undisputed" evidences or evidence that "the jury is required to believe"[62] is itself a controversial one. From the standpoint of the reexamination of a jury's verdict, if the jury is not at liberty to disregard evidence it considers irrelevant or unconvincing, that evidence may be used as a basis for the reexamination of the jury's verdict, and, possibly, rendition of judgment as a matter of law. Despite the fact that many state and federal cases unequivocally state that the jury is the exclusive judge of the facts and credibility of witnesses, there is general agreement that the jury is not at liberty to disregard the uncontradicted and unimpeached testimony of disinterested fact witnesses.[63] But there is also general agreement that the jury is only required to believe a limited range of evidence.

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59. This will be so even when the circumstantial evidence is itself not in dispute, but only the inferences are disputed.

60. *See* Lozano v. Lozano, 52 S.W.3d 141, 148 (Tex. 2001) (Phillips C. J., concurring and dissenting) ("If circumstantial evidence will support more than one reasonable inference, it is for the jury to decide which is more reasonable . . . .").

61. *See infra* text accompanying notes 62-104; *see also* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEXAS L. REV. 361, 365 (1960).

62. *Reeves*, 530 U.S. at 151.

63. *See* 9A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §§ 2527, 2529.

Treatment of the testimony of parties, interested witnesses, and experts has been less uniform,[64] but the general principle is that such testimony ordinarily raises a fact question for the jury, even if the testimony is uncontradicted.[65] Some courts have expressed the questionable idea that in some admittedly rare cases, "undisputed [circumstantial] evidence . . . allows of only one logical inference."[66] Generally, however, even when the circumstantial evidence is not disputed, the inference or inferences to be drawn from it are usually subject to reasonable dispute. In other words, the jury is not required to believe much other than the unimpeached and uncontradicted testimony of disinterested fact witnesses.

3. *Assessment of the Reasonableness of Inferences*

During the 1930s and 1940s, the Supreme Court decided two cases that considered the method for assessing the probative value of inferences drawn from circumstantial evidence. In *Pennsylvania R.R. v. Chamberlain*,[67] a Federal Employers' Liability Act (FELA)[68] case decided in 1933, the Supreme Court stated that "where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences."[69] This "equally probable inference" rule supported the trial judge's order directing the jury to find a verdict against claimants in a death action because the circumstantial evidence of a collision between two strings of railroad cars was counterbalanced and rendered insubstantial by other evidence that such a collision had not occurred.[70] The case was further complicated by the fact that only one witness testified for the claimant, whose testimony was "somewhat suspicious in itself."[71] Moreover, the

64. *See* Dorsaneo, *Judges and Juries*, *supra* note 17, at 1511-16.

65. *Id.* Under current thinking, if an interested witness' testimony is clear, direct, and positive, free from contradictions, inaccuracies, and circumstances tending to cast suspicion on the evidence, and if it could have been readily controverted if untrue, but was not controverted by an opponent, it may conclusively establish the matter in controversy. *See, e.g.*, Collora v. Navarro, 574 S.W.2d 65, 68-70 (Tex. 1978); Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 930-46 (1971).

66. Universal Life Ins. Co. v. Giles, 950 S.W.2d 48, 51 n.1 (Tex. 1997) (citing Wininger v. Ft. Worth & D.C. Ry. Co., 143 S.W. 1150, 1152 (Tex. 1912); Texas & N.O. Ry. Co. v. Rooks, 293 S.W. 554, 556-57 (Tex. Comm'n. App. 1927)).

67. 288 U.S. 333 (1933).

68. 45 U.S.C. § 51 (2001). The FELA permits recovery for personal injury or death of railroad employees engaged in interstate commerce if such injuries result "in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." *Id.*

69. *Chamberlain*, 288 U.S. at 339 (citing U.S. F. & G. Co. v. Des Moines Nat'l Bank, 145 F. 273, 279-80 (8th Cir. 1906)). "When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong." *Id.* at 340 (quoting Smith v. First Nat'l Bank in Westfield, 99 Mass. 605, 611-12 (1868)).

70. *Id.* at 338-44.

71. *Id.* at 337.

circumstantial evidence of a collision, consisting of the one witness' testimony that he heard a "loud crash" after the two strings of cars passed him at speeds making them likely to collide, was not only meager circumstantial evidence, but was contradicted by direct evidence of "three employees riding the nine-car string," and by "every other employee in a position to see."[72]

A decade later, the Supreme Court decided *Lavender v. Kurn*,[73] another FELA case involving the death of a railroad employee. As in *Chamberlain*, the cause of the employee's death was hotly contested. The personal representative of the employee's estate contended that the employee, Haney, was struck in the head with a mail hook. The claimant based this theory on the location of Haney's body, the design and operation of the mail car, and the nature of the terrain where Haney was struck.[74] The railroads[75] defended by asserting that the claimant's theory was "impossible" under the circumstances of the accident and instead contended that Haney was murdered by unknown "hoboes and tramps [who] frequented the area at night in order to get rides on freight trains."[76] The jury rendered a verdict in favor of Haney's estate, but the Missouri Supreme Court reversed.[77]

The U.S. Supreme Court reversed the judgment of the Missouri Supreme Court.[78] The Court explained that despite "evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney" and the existence of "facts from which it might reasonably be inferred that Haney was murdered," "such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney."[79] The Court explained its reasoning in the following manner:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a

72. *Id.* at 336.
73. 327 U.S. 645 (1946).
74. *Lavender*, 327 U.S. at 648-49.
75. *Id.* at 651. Two railroads were sued, one because of the mail hook and the other because of the dangerous condition of its railyard where Haney worked.
76. *Id.* at 650.
77. Lavender v. Kurn, 189 S.W.2d 253, 259 (Mo. 1945).
78. *Lavender*, 327 U.S. at 654.
79. *Id.* at 652.

contrary inference or feel that another conclusion is more reasonable.[80]

Accordingly, without expressly overruling or repudiating the "equally probable inference" rule set forth in *Chamberlain*, *Lavender* developed a "reasonable basis in the record"[81] standard. Under this standard, the jury, not the trial judge, and certainly not any appellate court, performs the important function of drawing and rejecting (or weighing) inferences from the evidence.[82] This standard was refined shortly thereafter, in *Wilkerson v. McCarthy*,[83] another FELA case, in which the Court explained that it is the jury's function to select among or between conflicting inferences raised by conflicts in the evidence.[84] Yet another FELA case from the same era states the converse rule that the rendition of a judgment as a matter of law is appropriate if "the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict."[85]

For a considerable period of time, many courts of appeals regarded all or part of *Lavender* and cases like it as merely FELA cases, rather than as "a general rule for testing the sufficiency of evidence to raise a question for the jury."[86] Thereafter, the part of *Lavender* that rejects the "equally probable inference" rule was recognized as establishing the general federal standard for sufficiency of the evidence in civil cases.[87] On the other hand, the potentially broader proposition stated in *Lavender* that "[o]nly when there is a complete absence of probative facts to support the conclusion reached does reversible error appear,"[88] has often been considered as a special verdict favorable rule restricted solely to FELA cases.[89]

As ultimately embraced and recast in *Anderson v. Liberty Lobby,*

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80. *Id.* at 653.

81. *Id.* at 652.

82. *See* Judge Holtzoff's opinion in Preston v. Safeway Stores, Inc., 163 F. Supp. 749, 752-53 (D.D.C. 1958) ("The [*Lavender*] case substitutes the principle that in such an event, it is for the jury to determine which inference to deduce and that the jury has a right to draw either one. The prior cases . . . [including *Chamberlain*] must be deemed to have been overruled *sub silentio*.").

83. 336 U.S. 53 (1949).

84. *Id.* at 57-62. Judgment as a matter of law should not be given "where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences." *Id.* at 62 (citing Washington & G.R. Co. v. McDade, 135 U.S. 554, 572 (1890)).

85. Brady v. S. Ry. Co., 320 U.S. 476, 479-80 (1943).

86. *See* Planters Mfg. Co. v. Prot. Mut. Ins. Co., 380 F.2d 869, 874 (5th Cir. 1967), *cert. denied*, 389 U.S. 930 (1967); *see also* Boeing Co. v. Shipman, 411 F.2d 365, 370-73 (5th Cir. 1969).

87. *See* Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1325 (11th Cir. 1982); *see also* Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 957 (1971); CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE, § 2528, at 293-94 (2d ed. 1995).

88. *See Daniels*, 692 F.2d at 1325 ("The aspect of *Lavender* and other FELA cases that the court [of appeals] took issue with in *Boeing* was that *any* evidence of negligence, even the slightest, would send the case to the jury.") (citing Boeing Co. v. Shipman, 411 F.2d 365, 370-71 (5th Cir. 1969)).

89. *See* CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2526, 277-82 (2d ed. 1995).

Inc.,[90] these authorities stand for the following general rule: A judgment as a matter of law should be given, "if under the governing law, there can be but one reasonable conclusion as to the verdict;"[91] but a judgment as a matter of law should not be given "[i]f reasonable minds could differ as to the import of the evidence. . . ."[92]

At present, the "reasonable basis" or "reasonable minds" rule spawned by *Lavender v. Kurn* appears to have been embraced in one form or another as the proper standard by the First,[93] Second,[94] Third,[95] possibly the Fourth,[96] Fifth,[97] Sixth,[98] Seventh,[99] Eighth,[100] Ninth,[101] Tenth,[102] Elev-

90. 477 U.S. 242, 250-51 (1986) (*cited with approval in Reeves*, 530 U.S. at 151).

91. *Id.* at 250-51 (citing Brady v. S. Ry. Co., 320 U.S. 476, 479-80 (1943)).

92. *Id.* (citing Wilkerson v. McCarthy, 376 U.S. 53, 62 (1949)).

93. *See* Amarin Plastics, Inc. v. Md. Cup Corp., 946 F.2d 147, 149 (1st Cir. 1991) ("We are compelled . . . even in a close case, to uphold the verdict unless the facts and inferences, when viewed in the light most favorable to the party for whom the jury held point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have arrived at this conclusion.") (quoting *Chedd-Angier Prod. v. Omni Publ'ns Int'l, Inc.*, 756 F.2d 930, 934 (1st Cir. 1985)

94. *See* Smith v. Lightning Bolt Prods., Inc., 861 F.2d 363, 367 (2d Cir. 1988) ("In ruling on a motion for judgment n.o.v., the district court is required to consider the evidence in the light most favorable to the party against whom the motion was made and to give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence. The court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury . . . . The boundaries of the appellate court's review of the denial of a motion for judgment n.o.v. are identical. We may overturn the denial of such a motion only if the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.") (internal citations omitted).

95. *See* Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 190 (3d Cir. 1992) ("While the plaintiffs' evidence is less than overwhelming, we do find that the plaintiffs have produced that minimum quantum of evidence necessary to withstand a motion for judgment n.o.v. Reviewing the record in the light most favorable to the non-moving party, judgment n.o.v. may not stand 'unless the record is critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief.' We must refrain from passing judgment on credibility issues; our task is to examine the record dispassionately for any evidence from which the jury may have rendered its verdict.")

96. *See* Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 818 (4th Cir. 1995) ("Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.").

97. *See* Hidden Oaks Ltd. v. City of Austin, 138 F.3d 1036, 1049 (5th Cir. 2000) ("In conducting this review, we must remember that 'we are not free to reweigh the evidence or to re-evaluate the credibility of witnesses.' Instead, we must accept any reasonable factual inferences made by the jury, being careful not to 'substitute . . . other inferences that we may regard as more reasonable.'") (quoting Hiltgen v. Sumrall, 47 F.3d 695, 700 (5th Cir. 1995)).

98. Blue Diamond Coal Co. v. United Mine Workers of Am., 436 F.2d 551, 559 (6th Cir. 1970) ("It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might

enth[103] and D.C.[104] Circuits.

Even aside from the *Lavender* holding, *Chamberlain's* "equal inferences rule" rests on dubious foundations. On the one hand, if there is not legally sufficient evidence to draw an inference, then the "equal inferences rule" is not needed. On the other hand, if there is enough evidence such that conflicting reasonable inferences can be drawn and the conflict's resolution depends upon weights assigned according to the decisionmaker's life experiences, then the "equal inferences rule" does not apply, because the choice between the inferences is for the jury.

What is worse is the "equal inferences rule" is not merely unnecessary, it is actually quite harmful. In the hands of a reviewing judge who wants to violate the jury's province so as to impose his or her own idiosyncratic preferences on the case, the "equal inferences rule" provides an ideal

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draw a contrary inference or feel that another conclusion is more reasonable.") (quoting *Lavender*, 327 U.S. at 653).

99. *See* Musgrave v. Union Carbide Corp., 493 F.2d 224, 229 (7th Cir. 1974) ("While the jury might possibly have inferred from the record that Process Engineering, rather than Union Carbide, attached the defective hitch assembly, it is uniquely the jury's function to choose from conflicting inferences those which it deems most reasonable, and where, as here, there is an evidentiary basis for the verdict of the jury, an appellate court will not reweigh the evidence or reject properly deducible inferences.").

100. *See* Sphere Drake Ins. PLC v. Trisko, 226 F.3d 951, 956 (8th Cir. 2000). ("Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.") (quoting *Lavender*, 327 U.S. at 653).

101. *See* Neely v. St. Paul Fire & Marine Ins. Co., 584 F.2d 341, 345 (9th Cir. 1978) ("It is well settled that proof must be sufficient to raise a reasonable inference that the act or omission complained of was in fact the proximate cause of injury. The verdict of a jury cannot rest on guess or speculation. That defendant's negligence could [p]ossibly have been the cause is not sufficient. The same rule applies where, as here, the evidence leaves the cause of an accident uncertain. The jury is not permitted to speculate in choosing one of the alternative possibilities, but is restricted to reasonable inferences based upon facts.") (quoting Wolf v. Reynolds Elec. & Eng'g. Co., 304 F.2d 646, 649 (9th Cir. 1962)).

102. *See* Zuchel v. Denver, Colo., 997 F.2d 730, 741 (10th Cir. 1993) ("When, as here, the evidence supports a reasonable inference favorable to the jury verdict, the fact that a contrary inference may also be drawn does not mandate the entry of j.n.o.v. 'Only when the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made is j.n.o.v. appropriate.'") (quoting EEOC v. Univ. of Oklahoma, 774 F.2d 999, 1001 (10th Cir. 1985)).

103. *See* Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1325 n.5 (11th Cir. 1982) ("*Boeing*'s rejection of the '*Planters* principle' did not affect the aspect of *Planters* that disapproved the equally probable inferences rule. This latter aspect of *Planters* survives. First, *Boeing* did not address this aspect of *Planters* or this aspect of the Supreme Court FELA cases on which *Planters* relied. The aspect of *Lavender* and other FELA cases that the court took issue with in Boeing was that *any* evidence of negligence, even the slightest, would send the case to the jury. Nowhere in *Boeing* is there an indication that the equally probable inferences rule was at issue or was considered. Therefore, in *Boeing* the court addressed only what quantum of evidence would make an inference reasonable, not whether the jury is allowed to choose between two equally probable, yet reasonable, inferences.") (emphasis in original).

104. *See* Hodge v. Evans Fin. Corp., 823 F.2d 559, 565 (D.C. Cir. 1987) ("A motion for judgment n.o.v should be granted only if 'the evidence, together with all inferences that can reasonably be drawn therefrom is so one sided' that reasonable persons could not disagree as to the verdict.") (quoting Vander Zee v. Karabatsos, 589 F.2d 723, 726 (D.C. Cir. 1978)).

tool. The abuse-of-power demons on the judge's shoulder need only whisper, "Just declare that the inferences are 'equal,' even if to do so requires an application of experience that our system entrusts to the jury." This is, in fact, what the Fifth Circuit panel did in *Reeves* when it analyzed the evidence by giving weight to the defense's case according to the panel's own preferences and declared that those inferences overcame the plaintiff's inferences. The utility of the "equal inferences rule" is so insubstantial that it was of virtually no use even in resolving *Chamberlain*, which contains its most eloquent articulation. Given its tendency to mislead, or rather to justify judicial imposition, the usefulness of the "equal inferences rule" is far outweighed by the mischief that it promotes.

Lavender and *Reeves* are companion cases—two representatives of the same philosophical school—which holds dear the parties' right to have the jury draw reasonable inferences from the evidence and to choose between competing reasonable inferences. Although some academic commentary suggests that the jury's ability to choose the more convincing inference from among competing reasonable inferences presents an entirely different subject from the principles articulated in the *Reeves* case,[105] the *Lavender* rule and the *Reeves* method for conducting evidentiary review are tightly intertwined and reinforce each other. Both cases recognize that the comparison of competing inferences involves weighing the evidence and usurpation of the jury's role.

An opinion handed down by the Court of Appeals for the Eleventh Circuit[106] attempts to reconcile *Lavender* and its progeny with *Boeing Co. v. Shipman*,[107] which states the supposed majority rule among the circuits, arguing the *Boeing* opinion's broad validation of whole record review at every stage of the process of legal sufficiency analysis does not revive the "equally probable inferences" rule eschewed previously by the Court of Appeals for the Fifth Circuit in the *Planters*[108] case. In *Boeing*, the Fifth Circuit held that legal sufficiency review should comprehend the entire record and that a verdict should be directed if the inference, contrary to the verdict, is "'so strong and overwhelming' that the inference in favor of the plaintiff is unreasonable."[109] This reasoning, which allows or

105. *See* CHILDRESS & DAVIS, *supra* note 45, § 3.03. *But see* WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2529 (2d ed. 1995).

106. *See* Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1325 n.5 (11th Cir. 1982) ("Second, the equally probable inferences rule of old cases such as *Smith v. Gen. Motors*, is inconsistent with the standard of sufficiency adopted in *Boeing*. In *Boeing* the court held that a verdict should be directed only if 'the facts and inferences point so *strongly and overwhelmingly* in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict.' This does not allow a rule where a verdict is directed simply because a contrary inference is equally likely. The contrary inference must be 'so strong and overwhelming' that the inference in favor of plaintiff is unreasonable. Moreover, in *Boeing* the court expressly stated that 'it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence *and inferences*.'") (quoting *Boeing*, 411 F.2d at 374) (emphasis added).

107. *See supra* note 46 and accompanying text.

108. *See* Planters Mfg. Co. v. Protection Mut. Ins. Co., 380 F.2d 869, 874 (5th Cir. 1967), *cert. denied*, 389 U.S. 930 (1967).

109. *Daniels*, 692 F.2d at 1325.

requires a reviewing court to compare (weigh) competing inferences, is not only unconvincing, it is a return to the philosophy expressed in *Chamberlain* by another means. It is also at variance with the principles clearly stated in *Reeves*. Fundamentally, *Boeing*'s form of whole record review undermines the *Lavender* rule precisely because it allows reviewing courts to compare and weigh competing reasonable inferences and decide which reasonable inference is more convincing or probable.

IV. *REEVES*' IMPACT ON SUMMARY JUDGMENT

The Supreme Court's invigoration of federal summary judgment practice occurred in the 1985 term when the Court decided a trilogy of cases permitting a defendant to base a summary judgment motion on the "no evidence" ground that the plaintiff, after adequate time for discovery, has produced or identified no probative evidence in support of the plaintiff's claims and should not be permitted to continue the prosecution of the case.[110] The focus of such a defendant's motion for judgment as a matter of law under Federal Rule of Civil Procedure 56[111] is on the legal sufficiency of the plaintiff's evidence, including particularly the evidence supporting a needed inference or inferences. This, of course, is the same problem dealt with in the *Reeves* doctrine: does the plaintiff have the legal right to convince a jury of these inferences, even though other, conflicting inferences are supported by the summary judgment evidence? Stated differently, to survive a summary judgment motion, must the plaintiff's desired inference be the most convincing or more probable inference? Indeed, is it permissible to evaluate the reasonableness of the plaintiff's desired inference by viewing it through the prism of the defendant's contradictory, and (from the plaintiff's perspective) unfavorable direct and circumstantial evidence?

Several well-respected commentators[112] have criticized the trilogy based on the assessment that trial and reviewing courts are authorized by these cases to weigh the summary judgment evidence even though Federal Rule of Civil Procedure 56 authorizes the rendition of a summary judgment only if the movant has established the right to judgment "as a

110. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

111. FED. R. CIV. P. 56.

112. *See* Samuel Issacharoff & George Leowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 84-85 (1990) (explaining that *Matsushita* and *Anderson* "expand the discretionary authority given to the district courts by allowing broad pretrial evidentiary review"); Linda Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 433, 439 (1987) ("Summary adjudication at the pleadings stage was never intended to become a mini-trial, yet recent Supreme Court cases will have precisely this effect."); Alan R. Kamp, *Federal Adjudication of Facts: The New Regime*, 12 AM. J. TRIAL ADVOC. 437, 456-57 (1989) (noting that the trilogy has "turned the summary judgment motion into a mini-trial"); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudication Process* 49 OHIO ST. L.J. 95, 107-08 (1988).

matter of law."[113] Nevertheless, *Reeves* strongly suggests that the commentators have misread the trilogy. Although *Celotex Corp. v. Catrett*[114] does apply trial-type procedural logic to summary judgment practice by imposing procedural burdens on movants and nonmovants alike in order to impose the burden to produce legally sufficient evidence on claimants prior to trial, during the pretrial phase of the litigation, nothing in *Celotex* suggests that trial judges may weigh the evidence. Moreover, as shown in the following paragraphs, despite the clear messages in *Matsushita Electric Industries Co. v. Zenith Radio Corp.*[115] and *Anderson v. Liberty Lobby, Inc.*,[116] that trial judges must assess the probative value of the summary judgment evidence by considering whether the evidence is of sufficient caliber to satisfy substantive legal standards applicable to antitrust conspiracy and public-figure defamation cases, those cases do not support the conclusion that the standards for rendition of judgment as a matter of law have been changed or relaxed in the mine run of cases.[117]

It is undeniable that *Matsushita* states that antitrust conspiracy claimants bear a heavier than normal evidentiary burden. This burden is imposed on claimants because "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case."[118] For policy reasons that are peculiar to antitrust conspiracy cases, antitrust law requires antitrust claimants to "show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents."[119] In other words, as a matter of substantive antitrust law, "[t]o survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 [of the Sherman Act] must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted indepen-

113. FED. R. CIV. P. 56.

114. 477 U.S. 317 (1986). *See generally* John E. Kennedy, *Federal Summary Judgment: Reconciling Celotex v. Caltrett with Adickes v. Kress and the Evidentiary Problems Under Rule 56*, 6 REV. OF LITIG. 227 (1987) (providing a critical analysis of *Celotex*'s burden shifting to claimants).

115. 475 U.S. 574 (1986)

116. 477 U.S. 242 (1986).

117. LEON GREEN, JUDGE AND JURY, 60 (1930) (first published as *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1025-026 (1928)).

118. *Matsushita*, 475 U.S. at 588.

119. *Id.* at 588. The Court cites *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. at 752, 764 (1984), for the principle that "conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support even an inference of antitrust conspiracy." *Monsanto*, which is relied on heavily by the Court in *Matsushita*, must be read in context. In *Monsanto* the Court ruled that an inference of a resale price-fixing conspiracy could not arise from a dealer's complaint to its manufacturer about a rival dealer's pricing practices because such an inference "would create an irrational dislocation in the market." *Id.* at 764. In other words, a dealer must be able to talk to its supplier about market conditions for the market to operate properly. It is important to note, however, that the *Monsanto* Court ruled that the plaintiff had enough evidence of resale price-fixing conspiracy to reach the jury, even absent evidence of dealer complaints. *See id.* at 765. Thus, the context of both *Matsushita* and *Monsanto* are responsible for the seemingly more stringent standard to survive summary judgment in antitrust conspiracy cases.

dently."[120] Of course, this approach to the assessment of the reasonableness of inferences in antitrust conspiracy litigation is completely at odds with the general "reasonable basis" or "reasonable minds" rule spawned by *Lavender v. Kurn* and broadly embraced as the "general rule" across the circuits. Accordingly, *Matsushita* provides no helpful guidance about evidentiary review in other types of cases or any reason to apply the antitrust conspiracy approach more broadly.[121]

Anderson v. Liberty Lobby, Inc., also is not a blueprint for assessing the probative value of circumstantial evidence in ordinary civil cases.[122] Rather, *Anderson* is a special type of defamation case, which holds the First Amendment[123] and the *New York Times*[124] rule requiring public-figure plaintiffs to prove with "convincing clarity"[125] that the defendant acted with "actual malice," applies to summary judgment practice under Federal Rule of Civil Procedure 56. In public-figure defamation cases, because the First Amendment mandates a "clear and convincing" standard of proof for actual malice, "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden."[126] The "substantive evidentiary standards that apply to the case"[127] are simply different and more de-

120. *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 475 U.S. at 764).

121. The Supreme Court has reversed its position with respect to the issuance of summary judgment in antitrust conspiracy cases since its 1962 decision in *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962). There the Court reversed a trial court's grant of summary judgment, stating:

> We believe that summary [judgment] procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

Id. at 473. *See also* Norfolk Monument Co. v. Woodlawn Mem'l Gardens, 394 U.S. 700 (1969); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). In contrast, the Court affirmed the granting of summary judgment in *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 277 (1968) in which after more than ten years of trying, the plaintiff could produce only one fact that unequivocally supported its conspiracy theory and in which the record contained "an overwhelming amount of contrary evidence of [defendant's] motives." *See also* C. Paul Rogers III, *Summary Judgments in Antitrust Conspiracy Litigation*, 10 LOY. U. CHI. L.J. 667, 673-78 (1979); Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibriating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986). Not surprisingly perhaps, given its apparent directional shift, the *Matsushita* Court cited neither *Poller* nor *Norfolk Monument*. It did, however, refer heavily to *Cities Service*. *See* ANDERSON & ROGERS, ANTITRUST LAW: POLICY AND PRACTICE, 314-21 (3d ed. 1999).

122. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) ("If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.").

123. U.S. CONST. amend. I.

124. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1974).

125. *Id.* at 285-86.

126. *See Anderson*, 477 U.S. at 254.

127. *Id.* at 255-56 ("Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that

manding in public figure defamation cases.[128] In fact, much of the Court's opinion in *Anderson* supports the method of evidentiary review prescribed in the Supreme Court's subsequent opinion in *Reeves*.[129]

After *Reeves,* Justice Brennan's *Anderson* conundrum,[130] about what trial judges should do in evaluating the sufficiency of summary judgment evidence under the summary judgment version of the judgment as a matter of law standard, has a clearer answer. Trial judges should review the totality of the summary judgment evidence to identify the direct evidence and reasonable inferences that relate to the challenged elements of the plaintiff's claims, but must "give credence" to the direct evidence and reasonable inferences that support the plaintiff's claims by disregarding the unfavorable evidence.

V. THE AFTERMATH AND EFFECTS OF THE *REEVES* DOCTRINE ON THE CIRCUIT COURTS

Many circuit courts have recognized that *Reeves* establishes the federal standard for review of judgments as a matter of law in both the conventional trial context under Rule 50 and for summary judgment under Rule 56.[131] The Second,[132] Fourth[133] and Eighth circuits[134] recognize that the

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the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.").

128. Whether the difference is sensible or justifiable when the issue is the propriety of summary judgment is highly debatable. Although many other states have apparently adopted the clear-and-convincing standard at the summary judgment stage, others have refused to do so. *See* Huckabee v. Time Warner Entm't Co., 19 S.W.3d 413, 421 n.2, 422 (Tex. 2000) (listing authorities and noting that a few state supreme courts have rejected the clear-and-convincing standard at the summary judgment stage because it does involve a weighing of the evidence); Moffatt v. Brown, 751 P.2d 939, 944 (Alaska 1988) ("The clear-and-convincing test inevitably implicates a weighing of the evidence, an exercise that intrudes into the province of the jury.") (quoting Dairy Stores, Inc. v. Sentinel Publ'g Co., 516 A.2d 220, 236 (N.J. 1986)). Despite the Supreme Court's insistence that it does not require courts to weigh the evidence, the clear-and-convincing evidence test is really a procedural variation on the weight of the evidence standard. *See, e.g., In Re* D.T., 34 S.W.3d 625, 630-31 (Tex. App.–Fort Worth 2000, no pet. h).

129. *See Anderson*, 477 U.S. at 249 ("[I]t is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."); *see also id.* at 250-51 ("Petitioners suggest, and we agree, that this [summary judgment] standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.") (internal citations omitted).

130. *See Anderson*, 477 U.S. at 258 (1986) (Brennan, J., dissenting) ("I am unable to divine from the Court's opinion . . . what a trial judge is actually supposed to do in ruling on a motion for summary judgment.").

131. *See, e.g.*, Williams v. Raytheon Co., 220 F.3d 16, 19 (1st Cir. 2000); White v. New Hampshire Dep't of Corrections, 221 F.3d 254, 259 (1st Cir. 2000); Tolbert v. Queens College, 242 F.3d 58, 70 (2d Cir. 2001); Edmondson v. Am. Motorcycle Ass'n, 2001 U.S. App. LEXIS 1506, at *20-22 (4th Cir. 2001) (not designated for publication); Perenco Nig. v. Ashland Inc., 242 F.3d 299, 304-05 (5th Cir. 2001); Frasure v. Shelby County Sheriff's Dep't, 2001 U.S. App. LEXIS 2450, at *2 (6th Cir. 2001) (not designated for publication); Pandya v. Edward Hosp., 2001 U.S. App. LEXIS 1141, at *4-5 (7th Cir. 2001) (not designated for publication); Kinserlow v. CMI Corp., 217 F.3d 1021, 1025 (8th Cir. 2000); Dry v.

proper way for a federal circuit court to view the evidence in the most favorable light in support of the verdict is to identify and evaluate the direct evidence and reasonable inferences in support of the verdict together with undisputed evidence the jury was required to believe, rather than to weigh the favorable and unfavorable evidence as a whole. Even the Fifth[135] and Eleventh[136] circuits have recognized that *Reeves* requires

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City of Durant, 2000 U.S. App. LEXIS 33330, at *8 (10th Cir. 2000); Hinson v. Clinch County Bd. of Educ., 231 F.3d 821, 826-27 (11th Cir. 2000); Duncan v. Washington Metro. Area Transit Auth., 240 F.3d 1110, 1122-23 (D.C. Cir. 2001) (Edwards, C.J., dissenting).

132. Tolbert v. Queens College, 242 F.3d 58, 70 (2d Cir. 2001) ("In ruling on a motion for JMOL, the trial court is required to: 'consider the evidence in the light most favorable to the party against whom the motion was made and to give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence. The court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury.' . . . In making its evaluation, the court should 'review all of the evidence in the record,' but 'it must disregard all evidence favorable to the moving party that the jury is not required to believe . . . . That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.' The same standards apply to an appellate court reviewing the grant of a Rule 50(b) motion.") (internal citations omitted).

133. Edmondson v. American Motorcycle Ass'n, 2001 U.S. App. LEXIS 1506, at *20-22 (4th Cir. 2001) (not designated for publication) ("Under Federal Rule of Civil Procedure 50, 'a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue."' In considering a motion for judgment as a matter of law, the district court should review "all of the evidence in the record.' 'In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.' 'Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses.'") (internal citations omitted).

134. Kinserlow v. CMI Corp., 217 F.3d 1021, 1025 (8th Cir. 2000) ("The [*Reeves*] Court stated that when entertaining a motion for judgment as a matter of law, a trial court 'should review all of the evidence in the record.' In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. 'Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.' Thus, although the court should review the records as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'") (internal citations omitted).

135. Perenco Nig. Ltd. v. Ashland Inc., 242 F.3d 299, 304-05 (5th Cir. 2001) ("The standard for summary judgment mirrors that for judgment as a matter of law. Thus, the court must review all of the evidence in the record, but make no credibility determinations or weigh any evidence. In reviewing all the evidence, the court must disregard all evidence favorable to the moving party that the jury is not required to believe, and should give credence to the evidence favoring the nonmoving party as well as that evidence supporting the moving party that is uncontradicted and unimpeached.") (internal citations omitted); *see also* Peel & Co. v. Rug Mkt., 238 F.3d 391, 394 (5th Cir. 2001) ("In reviewing all the evidence, the court must disregard all evidence favorable to the moving party that the jury is not required to believe"); Veeck v. S. Bldg. Code Cong. Int'l, Inc., 241 F.3d 398, 402 (5th Cir. 2001) ("In its review, the court must disregard all evidence favorable to the moving party that the jury is not required to believe . . . ."); Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 485 n.67 (5th Cir. 2001) ("although the court should review the record as a whole,

a reviewing court to "disregard all evidence favorable to the moving party that the jury is not required to believe."[137]

None of the circuit courts, however, have explicitly considered whether *Reeves* requires a reconsideration of evidentiary review standards applied by them before it was decided. The Fifth Circuit has not repudiated *Boeing Company v. Shipman*[138] as a permissible standard, despite its arguably overbroad whole-record scope of review. One Fifth Circuit panel opinion attempts to harmonize *Boeing* with *Reeves*' requirement that evidence unfavorable to a finding or proposed finding must be disregarded by sandwiching a mild version of *Boeing* between two sentences taken directly from the most important part of the *Reeves* opinion.[139] Unfortunately, however, other panels have failed to do so. Even worse, two Fifth Circuit panel decisions—one regarding Tulane University[140] and the other concerning Mississippi State University[141]—cite *Boeing* as if *Reeves* changed nothing about the process of evidentiary review.

Despite the understandable reluctance of courts and commentators to change their views on the important subject of the nature of evidentiary review of fact findings by reviewing courts, *Reeves* teaches that the

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it must disregard all evidence favorable to the moving party that the jury is not required to believe.").

136. Hinson v. Clinch County Bd. of Educ., 231 F.3d 821, 826-27 (11th Cir. 2000) ("We review the grant of summary judgment *de novo*. . . . A court 'must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence . . . . The court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses. In other words, we must consider the entire record, but disregard all evidence favorable to the moving party that the jury is not required to believe.'") (quoting *Reeves*, 530 U.S. at 150-51).

137. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000).

138. 411 F.2d 365 (5th Cir. 1969) (en banc). *See supra* note 46.

139. *See* Russell v. McKinney Hosp. Venture, 235 F.3d 219, 222 (5th Cir. 2001) ("Judgment as a matter of law is appropriate if 'there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.' Reviewing all the evidence in the record, we 'must draw all reasonable inferences in favor of the nonmoving party, and [we] may not make credibility determinations or weigh the evidence.' In so doing, we 'must disregard all evidence favorable to the moving party that the jury is not required to believe.'") (internal citations omitted).

140. *See* Rubinstein v. Adm'rs of the Tulane Educ. Fund, 218 F.3d 392, 401 (5th Cir. 2000) ("This Court reviews a district court's denial of a motion for judgment as a matter of law *de novo*. A motion for judgment as a matter of law . . . in an action tried by [a] jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict. This Court tests jury verdicts for sufficiency of the evidence under the standards set forth in *Boeing Co. v. Shipman*. . . . Under *Boeing*, we consider 'all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting [judgment as a matter of law] is proper.'") (internal citations omitted).

141. *See also* Vadie v. Miss. State Univ., 218 F.3d 365, 372 (5th Cir. 2000) (applying the *Reeves* doctrine incorrectly) ("A jury verdict must be upheld unless 'there is no legally sufficient evidentiary basis for a reasonable jury to find' as it did. We test jury verdicts for sufficiency of the evidence under the standards set forth in *Boeing Co. v. Shipman*, viewing all of the evidence and drawing all reasonable inferences in the light most favorable to the verdict.") (citations omitted).

method of whole-record review approved in *Boeing*[142] must be rejected. If it is not rejected completely, the method must be considerably revised to make it plain that the only way to consider all the evidence "in the light and with all reasonable inferences most favorable to the party"[143] in whose favor the finding was made is to add a second step to the analytical process.

Under the second step, the reviewing court must "give credence" to the favorable evidence and give no credence to the unfavorable evidence that the jury was not required to believe. As shown by the court of appeals' opinion in the *Reeves* case itself, any other approach may, and likely will, result in an invasion of the jury's province and a potential violation of reexamination clause[144] of the Seventh Amendment.

The *Reeves* opinion answers many important questions about appellate review of jury findings and verdicts. In the context of conventional trials and summary judgment proceedings, the method for evaluating whether the record evidence permits rendition of judgment as a matter of law should be based on *Reeves*' clear recognition of the factfinder's historical ability to draw reasonable inferences from the evidence, as well as *Reeves*' holding that a reviewing court must disregard unfavorable evidence that the jury was not required to believe in making rulings on motions for judgment as a matter of law. Other more difficult questions remain, however, with respect to a verdict review grounded on the weight of the evidence standard and the role of federal appellate courts in reviewing district judges' decisions to deny motions for a new trial or for remittitur in this context.

VI. THE ROLE OF WEIGHT OF THE EVIDENCE REVIEW OF LIABILITY FINDINGS AND DAMAGE AWARDS

The development of weight of the evidence review has been more recent, less consistent from circuit to circuit, and complicated by differences in the appellate treatment of: (1) liability findings attacked as against the clear weight of the evidence, (2) compensatory damage awards that are attacked for excessiveness under varying standards, and (3) punitive dam-

142. 411 F.2d 365 (5th Cir. 1969).

143. *Id.* at 374. The full version of the *Boeing* test is as follows:

> [T]he Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions [for directed verdict or j.n.o.v.] is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.

144. U.S. CONST. amend. VII.

age awards that are challenged as excessive as a matter of fact or as unconstitutionally excessive as a matter of law.

A. Compatibility With The Reexamination Clause

The power of trial judges to grant new trials because verdicts or particular jury findings are contrary to the clear weight of the evidence is universally recognized and supported by ample common law precedent.[145] But the constitutional ability of federal courts of appeals to conduct weight of the evidence review of jury findings has been unsettled for at least the last fifty years.

As long ago as 1838, the Supreme Court had considered the issue well-settled and without question, "that the effect and sufficiency of the evidence are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial, and cannot be made a ground of objection on a writ of error [*i.e.* an appeal]."[146]

As recently as 1940, the Supreme Court continued to regard weight of the evidence review by appellate courts as entirely incompatible with the reexamination clause of the Seventh Amendment.[147]

Despite the difficulty of squaring weight of the evidence review with the reexamination clause,[148] Professors Wright and Miller have reported that by 1970 a majority of the courts of appeals embraced weight of the evidence review of a trial judge's denial of a motion for a new trial under an abuse of discretion "standard of review."[149] It was not until 1996, however, that the Supreme Court appears to have approved of this development, at least in the context of excessive damage awards.

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145. *See* 3 W. Blackstone, Commentaries on the Laws of England 387 (1768) (noting that a new trial could be granted by trial judges if the jury rendered a "verdict without or contrary to evidence" or for "exorbitant damages").

146. United States v. Laub, 37 U.S. 1, 5 (1838); *see also* Lincoln v. Power, 151 U.S. 436, 437-38 (1894) (holding that review of a verdict on appeal for excessiveness is not permitted by the Seventh Amendment).

147. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 248 (1940) ("Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review"); *cf.* United States v. Johnson, 327 U.S. 106, 111 (1946) ("But it is not the province of this Court or the Circuit Court of Appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact.") (citing Holmgren v. United States, 217 U.S. 509 (1910)); Holt v. United States, 218 U.S. 245 (1910); Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1933). *See also* Portman v. American Home Prods. Corp., 201 F.2d 847, 848 (2d Cir. 1953) (stating that "orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence" are not reviewable on appeal).

148. *See* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 760-63 (1957); Charles A. Wright, Arthur R. Miller & Mary Kay Kane, 11 Federal Practice & Procedure § 2819, at 202-06 (1995).

149. Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2819, at 199 (2d ed. 1995) ("It is by now standard doctrine that such orders may be reviewed for abuse of discretion, even when based upon such broad grounds as the trial court's conclusion that the verdict was excessive or against the weight of the evidence.") (citing Taylor v. Washington Terminal Co., 409 F.2d 145, 147 (D.C. Cir. 1969).

Against a background of conflicting circuit court decisions on the issues of whether and under what circumstances reviewing courts could set aside a jury's verdict and order a new trial because the verdict is contrary to the weight of the evidence, in *Gasperini v. Center for Humanities, Inc.*,[150] a divided Court[151] partially resolved the issue of whether weight of the evidence review is compatible with the reexamination clause.

Gasperini is a diversity case in which Gasperini, a journalist who had loaned 300 original slide transparencies to the Center for Humanities, Inc., sued the Center for the loss of the transparencies under various state-law claims for relief, including breach of contract, conversion, and negligence.[152] After trial, the jury awarded Gasperini $450,000 in compensatory damages, or, as announced by the presiding juror, "[$]1500 each, for 300 slides."[153]

The Center attacked the verdict on a number of grounds, including excessiveness.[154] The district court denied the Center's motion.[155] The Court of Appeals for the Second Circuit vacated the trial court's judgment, holding that the $450,000 verdict "materially deviates from what is reasonable compensation"[156] under the standard of review prescribed by the New York statute.[157] The Second Circuit used this standard to set

150. 518 U.S. 415 (1996). Despite its constitutional importance, academic response has been limited. Although many articles mention *Gasperini*, academic reaction has been largely uncritical. Perhaps the strongest critic is Professor Tribe. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-32, at 629 (2000) ("Given the Seventh Amendment's distinct significance in restraining federal judicial power, and given the importance of the amendment to the Framers and to the constitutional structure as a whole, one can only hope that the aberrant view expressed by a 5-4 vote in *Gasperini* will not be accorded deference as a matter of *stare decisis* when the issue arises again, and that one or more Justices in the *Gasperini* majority will be persuaded to reconsider the matter in an appropriate case.") On the other hand, Professor Woolley apparently does not regard the decision as aberrant or unpalatable. *See* Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 506 (1998) ("In short, *Gasperini* requires a dynamic interpretation of the Reexamination Clause.").

A number of students have addressed the opinion as well. *See, e.g.*, James C. Lopez, Comment, *Appellate Control of Excessive Jury Verdicts Since Gasperini v. Center for Humanities: From Nisi Prius Courts to "Gasperini Hearings,"* 66 U. CIN. L. REV. 1323 (1998); Amy McCullough, Comment, *Gasperini v. Center for Humanities: Clarifying Federal Appellate Review or Judicial License in Tort Reform?*, 32 NEW ENG. L. REV. 853 (1998); Joseph B. Koczko, Note, *Gasperini v. Center for Humanities, Inc.: State Jury Award Controls Supplant Seventh Amendment Protections*, 18 PACE L. REV. 199 (1997); Eva Madison, Note, *The Supreme Court Sets New Standards of Review for Excessive Verdicts in Federal Court in Gasperini v. Center for Humanities, Inc.*, 50 ARK. L. REV. 591 (1997).

151. Justice Ginsburg, joined by Justices O'Connor, Kennedy, Souter and Breyer, delivered the majority opinion. Justice Stevens filed a dissenting opinion which agrees with the majority's conclusion that the reexamination clause does not preclude review. Justice Scalia filed a dissenting opinion which disagrees with the majority opinion and with Justice Stevens' dissent. Chief Justice Rehnquist and Justice Stevens join Justice Scalia's dissent.

152. Gasperini v. Ctr. for Humanities Inc., 518 U.S. 415, 420 (1996).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 421. *See also* Gasperini v. Ctr. for Humanities, Inc., 66 F.3d 427, 430-31 (2d Cir. 1995); Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1011 (2d Cir. 1995).

157. *See* N.Y.C.P.L.R. 5501 (c) (Consol. 2001) ("In reviewing a money judgment in an action . . . in which it is contended that the award is excessive or inadequate and that a new

aside the $450,000 verdict and ordered a new trial, unless Gasperini agreed to an award of $100,000.[158]

The Supreme Court granted *certiorari* on the question of what standard a federal court must use to measure the alleged excessiveness of a jury's compensatory damage verdict based on state law in a diversity case.[159] The Supreme Court held that New York law sets the standard of review of compensation awards for excessiveness to be applied by federal trial court judges in diversity cases governed by New York law,[160] but ruled that appellate review of the trial court's decision must be based on a more deferential abuse of discretion standard.[161]

Justice Ginsburg's majority opinion in *Gasperini* clearly states the universally acknowledged rule that the Seventh Amendment's reexamination clause does not preclude trial judges from overturning jury verdicts and granting new trials if the verdicts appear to trial judges to be against the weight of the evidence.[162] Moreover, the Court further held that trial courts' discretion to set aside verdicts on this ground includes the ability to overturn a jury's damage award for excessiveness.[163] More importantly, however, the majority opinion holds that weight of the evidence review (or at least appellate review of a trial judge's decision to affirm a damage award under an abuse of discretion standard) "is reconcilable with the Seventh Amendment as a control necessary and proper to the administration of justice."[164]

Unfortunately, Justice Ginsburg's majority opinion in *Gasperini* is extremely vague about what the reexamination clause allows or requires an appellate court to do. The Court begins its description of what the reexamination clause allows by quoting the Second Circuit's 1961 opinion in *Dagnello v. Long Island Railroad*,[165] thereby embracing the following view: "we must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law."[166]

Thereafter, the majority opinion explains that "[a]ll other Circuits

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trial should have been granted unless a stipulation is entered to a different award, that appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.").

158. *Gasperini*, 518 U.S. at 421.

159. *Id.* at 422.

160. The Supreme Court harmonized New York law and the pertinent federal rule of civil procedure. *See* FED. R. CIV. P. 59.

161. *Gasperini*, 518 U.S. at 430-31, 438-39. The Court further held that both of these approaches to review are consonant with the *Erie* doctrine. *See* Erie Ry. Co. v. Tompkins, 304 U.S. 64 (1938).

162. *Gasperini*, 518 U.S. at 433.

163. *Id.* (recognizing that remittitur withstands Seventh Amendment challenge, but that additur does not) (citing Dimick v. Schiedt, 293 U.S. 474, 486-87 (1935).

164. *Id.* at 435.

165. Dagnello v. Long Island R.R. Co., 289 F.2d 797 (2d Cir. 1961).

166. *Id.* at 806.

agree,"[167] approves "this line of decisions,"[168] and concludes that nothing in the Seventh Amendment precludes appellate review of a trial judge's denial of a motion to set aside a jury verdict as excessive.[169] The remainder of the majority opinion speaks vaguely about "Seventh Amendment constraints" on the ability of circuit courts to review damage awards,[170] and ultimately holds that because appellate judges see only a "cold paper record" and do not have the same opportunity as trial judges to consider the evidence, appellate review must be conducted in the following manner:

> District court applications of the [New York statutory] "deviates materially" standard would be subject to appellate review under the standard the Circuits now employ when inadequacy or excessiveness is asserted on appeal: abuse of discretion. In light of *Erie*'s doctrine, the federal appeals court must be guided by the damage-control standard state law supplies, but as the Second Circuit itself has said: "If we reverse, it must be because of an abuse of discretion . . . . The very nature of the problem counsels restraint . . . . We must give the benefit of every doubt to the judgment of the trial judge."[171]

By embracing the Second Circuit's *Dagnello* opinion, the Court sends mixed messages to the circuit courts: "give the benefit of every doubt to the trial judge," but "whether [the upper limit] has been surpassed is not a question of fact . . . but a question of law."[172] When this ambiguous advice is coupled with the Court's general approval of "the standard [or standards] the circuits now employ,"[173] the message conveyed to the circuits is or amounts to "[b]ehave yourselves–[b]ut be sure the courts below observe the legal limit."

Gasperini presents more interpretive problems concerning the respective roles of judges, juries and reviewing courts than it resolves. The Court's opinion does not hold generally that weight of the evidence review of liability findings by appellate courts is permitted by the Seventh Amendment.[174] Moreover, the internal logic of Justice Ginsburg's major-

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167. *Gasperini*, 518 U.S. at 435.

168. *Id.* at 436.

169. *Id.* at 436 (quoting Justice Stewart's dissenting opinion in *Gruenthal v. Long Island R.R. Co.*, 393 U.S. 156, 164 (1968)).

170. *Id.* at 438.

171. *Id.* at 438-39 (internal citations omitted). The majority's footnote 23 criticizes Justice Scalia's dissent, which reasons and would hold that federal standards should govern the conduct of both federal trial and appellate judges:

> If liability and damage-control rules are split apart here, as Justice Scalia says they must be to save the Seventh Amendment, then Gasperini's claim and others like it would be governed by a most curious "law." The sphinx-like, damage-determining law he would apply to this controversy has a state forepart, but a federal hindquarter. The beast may not be brutish, but there is little judgment in its creation.

Id. at 439, n.23. Regardless of what this footnote means or was meant to convey, it appears to describe the majority's own holdings.

172. *Dagnello*, 289 F.2d at 806.

173. *Gasperini*, 518 U.S. at 438.

174. One commentator has reasoned that a footnote in Justice Ginsburg's opinion requires a "dynamic interpretation" of the reexamination clause giving the courts more lati-

ity opinion, grounded largely on the Second Circuit's *Dagnello* opinion, is itself based on the concept that the upper limit of a damage award, whether liquidated or unliquidated, is a question of law. This concept is impossible to extend to weight of the evidence review of liability findings, without making all verdicts subject to *de novo* review and advisory. It is also difficult to apply the logic of the *Gasperini* decision to conventional remittitur practice, which challenges the size of unliquidated damage awards as a matter of fact. Nonetheless, most of the circuit courts of appeals do conduct weight of the evidence review of liability findings and review unliquidated damage awards for excessiveness as a matter of fact.

The next part of this article addresses the standards of review the circuits "now employ" in performing weight of the evidence review of liability and damage findings.[175]

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tude in fashioning new procedures, while dismissing Justice Scalia's historical interpretation of the meaning of the reexamination clause, calling it a "static interpretation." *See* Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 505 (1998).

Justice Ginburg's footnote follows the majority's holding that "[n]othing in the Seventh Amendment . . . precludes appellate review of the trial judges denial of a motion to set aside [a jury verdict] as excessive" as that awarded in *Gasperini*. The footnote states:

> If the meaning of the Seventh Amendment were fixed at 1791, our civil juries would remain, as they unquestionably were at common law, "twelve good men and true," . . . . Procedures we have regarded as compatible with the Seventh Amendment, although not in conformity with practice at common law when the Amendment was adopted, include new trials restricted to the determination of damages and Federal Rule of Civil Procedure 50(b)'s motion for judgment as a matter of law.

Gasperini, 518 U.S. at 436 n.20. Justice Scalia's dissent in *Gasperini* explains:

> [t]he practice of *federal* appellate reexamination of facts found by a jury is precisely what the People of the several States considered *not* to be good legal policy in 1791. Indeed, so fearful were they of such a practice that they constitutionally prohibited it by means of the Seventh Amendment.

Gasperini, 518 U.S. at 450 (Scalia, J., dissenting).

175. After appeal to the United States Supreme Court, *Gasperini* was remanded to the appellate court to remand to the district court to apply Section 5501(c) of New York's Civil Practice Law and Rules and to determine a motion for a new trial. *See Gasperini*, 518 U.S. at 439. Subsequently, in *Gasperini v. Ctr. For Humanitis, Inc.*, 972 F. Supp. 765, 768 (S.D.N.Y. 1997), the district court found that:

> [t]he *Gasperini* decision in the Supreme Court . . . does no more than change the standard for when a remittitur should be ordered. It does not tell us how to go about computing the amount of the remittitur . . . this court should follow existing Second Circuit precedent in fixing the amount. This requires us to "reduce the verdict only to the maximum that would be upheld by the trial court as not excessive." . . . This is the least intrusive standard." (internal citations omitted).

In so doing, the district court concluded "that the sum of $375,000.00 represents the maximum award which a jury could give without deviating materially from what would be reasonable compensation . . . a remittitur of $75,000.00 of the judgment" *Id.* at 773.

After the district court's 1997 decision, the Center for Humanities, Inc., appealed, arguing "that the district court had abused its discretion simply because it reached a contrary conclusion to that reached by the panel of this court that first considered the issue." Gasperini v. Ctr. for Humanities, Inc., 149 F.3d 137, 141 (2d Cir. 1998). The Second Circuit, however, held that the district court had acted within its discretion, noting that "[w]e cannot set aside [the district court's] fairly-reasoned decision merely because we might disagree with the outcome it reached, or because, if it were left to us, we might decide the matter differently." *Id.* at 142.

B. Circuit Courts' Application of the Abuse of Discretion Standard

1. Review of Liability Findings

The circuit courts of appeals have been divided on the fundamental question of whether weight of the evidence review extends to the courts of appeals. The Second Circuit will not review a district court's determination that a jury's liability findings are not supported by the weight of the evidence.[176] For a number of years, the Second Circuit applied the same approach to a jury's compensatory damage award.[177] In its 1961 *Dagnello* decision, however, the Second Circuit decided that the reexamination clause of the Seventh Amendment permitted review of damage awards for excessiveness on the theory that the "upper limit" of a damage award is not "a question of fact with respect to which reasonable men may differ, but a question of law."[178] The Court of Appeals for the Eighth Circuit has questioned whether the Seventh Amendment permits appellate weight of the evidence review of jury findings if the district judge has overruled a motion for new trial and ruled that the verdict is not against the weight of the evidence,[179] but has grudgingly permitted a strict form of weight of the evidence review in several cases.

For those circuits that have permitted appellate review of a district court judge's refusal to set aside civil jury awards as contrary to the weight of the evidence, the standard used to review the factual sufficiency of the evidence to support a jury finding or verdict on appeal is abuse of

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Ultimately, the Second Circuit remanded the case to the district court because in its 1997 decision, the district court:

> increased th[e] number [of slides] to 310 by including ten slides allegedly delivered to the Center by Gasperini's mother. However, the delivery of those slides was the subject of disputed testimony . . . . The district court has provided no explanation for its rejection of the jury's finding in this regard; nor do we perceive one.

Gasperini, 149 F.3d at 144. Upon remanding the case to the district court, the Second Circuit noted, "After two rounds in the district court, three in this court, and one in the Supreme Court, we leave it to Gasperini to decide whether he wishes to leave the ring now, or whether this potential difference of $13,000 plus pre-judgment interest is worth a third round in the district court." *Id.*

176. *See, e.g.*, Stonewall Ins. Co. v. Asbestos Claims Mgmt., 73 F.3d 1178, 1199 (2d Cir. 1995) (noting that the decision to test liability findings under the weight of the evidence standard is "one of those few rulings that is simply unavailable for appellate review"); Blissett v. Coughlin, 66 F.3d 531, 535 (2d Cir. 1995) ("A district court order denying a motion for new trial on the grounds that a verdict is against the weight of the evidence is not reviewable in this Circuit"); Dunlap-McCuller v. Riese Org., 980 F.2d 153, 157 (2d Cir. 1992), *cert. denied*, 510 U.S. 908.

177. *See* Dagnello v. Long Island R.R. Co., 289 F.2d 797, 805-06 (2d Cir. 1961).

178. *Id.* at 806; *see also* Blissett v. Coughlin, 66 F.3d 531, 536 (2d Cir. 1995) ("[T]he standard of appellate review of damage awards, whether compensatory or punitive 'is whether the award is so high as to shock the judicial conscience and constitute a denial of justice.'").

179. *See* Thongvanh v. Thalacker, 17 F.3d 256, 259-260 (8th Cir. 1994); *see also* White v. Pence, 961 F.2d 776, 782 (8th Cir. 1992) (distinguishing review grounded on the issue of whether the district court applied the right standard of review).

discretion.[180] But the circuits apply this standard in different ways. The Fifth Circuit has fashioned a very deferential version of the abuse of discretion standard for cases in which the trial judge has denied a motion for new trial on weight of the evidence grounds. Under this approach, the trial judge's ruling must be affirmed "unless there is a complete absence of evidence to support the jury's verdict."[181] The Eighth Circuit takes a similar approach to review of a district court's denial of a motion for new trial if the basis of the decision is that the verdict is not against the weight of the evidence, explaining that although the standard of review is abuse of discretion, the denial of the motion "is virtually unassailable."[182]

The First,[183] Fourth,[184] and Eleventh[185] Circuits have stated that the denial of a motion for new trial on weight of the evidence grounds should not be reversed, unless a clear or manifest injustice would result. The Sixth Circuit will not reverse a trial court's denial of a motion for new trial unless the court of appeals' review of the record leads it to "a definite and firm conviction that the trial court has committed a clear error of judgment."[186] The Ninth Circuit applies a similarly "stringent standard . . . when the motion is based on insufficiency of the evidence. A motion for a new trial may be granted . . . only if the verdict is against the 'great weight' of the evidence or 'it is quite clear that the jury has reached a seriously erroneous result.'"[187]

Other circuits also appear to use arguably less deferential formulations when inquiring whether the trial judge's denial of a motion for new trial is an abuse of discretion because the verdict is against the "clear weight" of the evidence. This is the approach taken in the Seventh Circuit.[188] Yet, other Seventh Circuit decisions explain further that neither the trial judge nor the court of appeals may substitute their judgments for the jury's verdict because of mere disagreement with the verdict.[189]

The foregoing cases show that the circuit courts of appeals have developed different approaches to weight of the evidence review. All of the approaches exude a generally deferential attitude, but beyond attitude

180. *See* 11 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2820 (2d ed. 1995); 6A MOORE'S FEDERAL PRACTICE § 59.08[6] (2d ed. 1995).

181. *See, e.g.*, Litherland v. Petrolane Offshore Constr. Servs., 546 F.2d 129, 134 (5th Cir. 1977); United States v. An Article of Drug Consisting of 4,680 Pails, 725 F.2d 976, 990 (5th Cir. 1984); *cf.* Thrift v. Hubbard, 44 F.3d 348, 359 (5th Cir. 1995) (citing and applying *Boeing Co. v. Shipman*'s standard to district court's denial of motion for new trial).

182. Porous Media Corp. v. Pall Corp., 110 F.3d 1329, 1338, 1340 (8th Cir. 1997).

183. *See* Fernandez v. Corporacion Insular De Seguros, 79 F.3d 207 (1st Cir. 1996).

184. *See* Aetna Cas. & Sur. Co. v. Yeatts, 122 F.2d 350, 352-53 (4th Cir. 1941).

185. *See* Hewitt v. B.F. Goodrich Co., 732 F.2d 1554, 1556 (11th Cir. 1984).

186. Powers v. Bayliner Marine Corp., 83 F.3d 789, 796 (6th Cir. 1996) (quoting Monette v. AM-7-7 Baking Co., 929 F.2d 276, 280 (6th Cir. 1991)).

187. Venegas v. Wagner, 831 F.2d 1514, 1519 (9th Cir. 1987) (quoting Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336, 1347 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985)).

188. *See* Wassell v. Adams, 865 F.2d 849, 854 (7th Cir. 1989) ("a new trial can be granted only when the jury's verdict is against the clear weight of the evidence") (quoting Davlan v. Otis Elevator Co., 816 F.2d 287, 289 (7th Cir. 1987)).

189. Sheehan v. Donlen Corp., 173 F.3d 1039, 1047 (7th Cir. 1999).

there is no particular uniformity. What is worse, the circuit courts do not treat weight of the evidence review as an adjunct to legal sufficiency review, despite the fact that evidentiary review of jury findings for legal sufficiency and factual sufficiency, under some type of weight of the evidence or factual sufficiency standard, is or should be an integral part of the same appellate process.

2. *Review of Compensatory Damage Awards*

Challenges to damage awards on the grounds of excessiveness have received similar treatment. As explained in Justice Ginsburg's opinion in *Gasperini*, for a number of years such review was regarded as inconsonant with the Seventh Amendment's reexamination clause.[190] By 1970, however, all circuits had embraced the view that a trial judge's denial of a new trial motion (or refusal to suggest a remittitur as a condition to the denial of a new trial motion) based on the ground that the verdict was excessive could be reviewed by a circuit court of appeals under an abuse of discretion standard.[191] As with weight of the evidence review of liability findings, the circuits have differed in the manner in which they define the abuse of discretion standard. Although not all courts of appeals' opinions elaborate on the abuse of discretion standard of review,[192] the First,[193] Second,[194] Third,[195] Fifth,[196] Sixth,[197] possibly the Seventh,[198]

190. *Gasperini*, 518 U.S. at 434.

191. *Id.* at 435. *See also* CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 2820 (2d ed. 1995); Charles Alan Wright, *The Doubtful Omniscience of Appellate Court*, 41 MINN. L. REV. 751, 758-764 (1957) (surveying developments through 1956).

192. *See, e.g.*, Inter Med. Supplies v. EBI Med. Sys., 181 F.3d 446, 462 (3d Cir. 1999), *cert. denied*, Orthofix S.R.L. v. EBI Med. Sys., 528 U.S. 1076 (2000) ("We review the District Court's denial of post-trial motions regarding that compensatory damages verdict for abuse of discretion.").

193. *See* Wierstak v. Heffernan, 789 F.2d 968, 974 (1st Cir. 1986) ("The award of $40,000 compensatory damages is not so high as to shock the conscience.").

194. *See* Dagnello v. Long Island R.R. Co., 289 F.2d 797, 802 (2d Cir. 1961).

195. *See* Rocco v. Johns-Manville Corp., 754 F.2d 110, 113-14 (3d Cir. 1985) ("The verdict in this case was very generous, but the district court did not find it so excessive as to shock the conscience of the court. Our scope of review is narrow, and we must affirm the jury's damage award unless it is 'so grossly excessive as to shock the judicial conscience.' . . . On this record we cannot say that the district court abused its discretion in the denial of Pittsburgh Corning's motion for a new trial.") (internal citations omitted).

196. *See* Ham Marine, Inc. v. Dresser Indus., Inc., 72 F.3d 454, 462 (5th Cir. 1995) ("An assessment of damages is not reversed unless it is clearly erroneous . . . . Only where it is 'so large as to shock the judicial conscience, so gross or inordinately large as to be contrary to right reason, so exaggerated as to indicate bias, passion, prejudice, corruption or other improper motive' will we reverse a jury verdict for excessiveness.") (internal citations omitted).

197. Black v. Ryder/P.I.E. Nationwide, Inc., 970 F.2d 1461, 1470 (6th Cir. 1992) ("A damage award should not be overturned unless a court is left with the definite and firm conviction that a mistake resulting in plain injustice has been committed, or unless the award is contrary to all reason. A damage award may also be overturned if it is so disproportionately large as to shock the conscience.") (internal citations omitted).

198. *See* Medcom Holding Co. v. Baxter Traverol Labs, 106 F.3d 1388 (7th Cir. 1997); Holmes v. Elgin, Joliet & E.R. Co., 18 F.3d 1393, 1396 (7th Cir. 1994); Stutzman v. CRST, Inc., 997 F.2d 291, 296 (7th Cir. 1993) ("[w]e will alter jury awards only if they are 'mon-

probably the Eighth,[199] Ninth,[200] Tenth,[201] and Eleventh[202] Circuits apply or have applied more rigorous standards to protect damage awards made by juries, especially when trial judges have refused to set aside or reduce the awards.

The mechanism by which the excessiveness of a jury's damage award is tested in most American jurisdictions is by remittitur. This practice has also been widely used by trial courts in the federal system. As noted in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[203] under this approach in diversity cases:

> [T]he role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse of discretion standard.[204]

In performing the limited function of a federal appellate court, we perceive no federal common-law standard, or compelling federal policy, which convinces us that we should not continue to accord considerable deference to a district court's decision not to order a new trial.[205]

As noted above, although Justice Ginsburg's majority opinion in *Gasperini* cites and quotes from *Browning-Ferris*, the *Gasperini* opinion does not broadly validate the ability of federal appellate courts to determine that a verdict is excessive as a matter of fact or suggest a remittitur on that basis. Such an approach would be enormously preferable to the treatment of the issue as a law question for several reasons. First, reclas-

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strously excessive, born of passion and prejudice, or not rationally related to the evidence.'") (quoting Dresser Indus., Inc. v. Gradall Co., 965 F.2d 1442, 1446 (7th Cir. 1992)).

199. United States v. Big D Enters., Inc., 184 F.3d 924, 929-930 (8th Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000) ("we will not disturb a district court's decision to deny a motion for new trial unless we find that the jury's verdict contravenes the great weight of the evidence to such an extent that allowing the verdict to stand will result in a miscarriage of justice.").

200. *See* Morgan v. Woessner, 975 F.2d 629, 640 (9th Cir. 1992); Davis v. Mason County, 927 F.2d 1473, 1485 (9th Cir. 1991) ("Unless the amount of damages is grossly excessive, unsupported by the evidence, or based solely on speculation, the reviewing court must uphold the jury's determination of the amount.").

201. *See* Malik v. Apex Int'l Alloys, Inc., 762 F.2d 77, 81 (10th Cir. 1985) ("Defendant asks this court to order a remittitur of $100,000.00 if we should fail to reverse the trial court's denial of defendant's motion for new trial and for judgment notwithstanding the verdict. Remittitur is granted only where the verdict is so grossly excessive that "it shocks the conscience of the court."") (quoting Spaeth v. Union Oil Co. of Cal., 710 F.2d 1455, 1460 (10th Cir. 1983).

202. *See* Redd v. Phenix City, Ala., 934 F.2d 1211, 1215 n.3 (11th Cir. 1991) ("The standard used in reviewing excessive jury awards is when the award 'shocks the conscience of the court.' In such cases, the judge is justified in acting when the jury's verdict falls outside the realm of reason.") (quoting Simon v. Shearson Lehman Bros. Inc., 895 F.2d 1304 (11th Cir. 1990)).

203. 492 U.S. 257 (1989).

204. *Id.* at 279.

205. *Id.* at 279-80. The Court notes at this point that "because the federal courts operate under the strictures of the Seventh Amendment . . . we are reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury." *See id.* at 280 n.26.

sification of the issue as a law question is really a verbal charade that allows or requires the nullification of the jury's role in the litigation process because it implies that no deference whatsoever is required to be given to the jury's determination. Second, the remittitur remedy is a considerably less intrusive but nonetheless effective method for handling excessive verdicts. Third, this is the way that most, if not all, American procedural systems have handled these issues.

3. *Review of Punitive Damage Awards*

The subject of excessive punitive damage awards has generated considerable controversy. In a series of decisions, the Supreme Court has ruled that the excessive fines clause of the Eighth Amendment[206] does not apply to awards of exemplary damages in civil cases between private parties.[207] Similarly, the Court has further held that the common-law method under which the trier of fact decides whether and to what extent a tortfeasor should be assessed exemplary or punitive damages does not offend due process principles, as long as defendants are protected from arbitrary and excessive verdicts through jury instructions and meaningful judicial review.[208] Nonetheless, a "grossly excessive" award is an abuse of the jury's discretion and may be set aside on the ground that it violates the due process clause of the Fourteenth Amendment,[209] and therefore, is unconstitutional.[210] In *BMW of North America, Inc. v. Gore*, the Supreme Court identified three factors as affecting the determination of whether an award is "grossly excessive":

> [(1)] the degree of reprehensibility of the [defendant's conduct]; [(2)] the disparity between the harm or potential harm suffered by [the plaintiff] and [the] punitive damages award; and [(3)] the difference between [the size of the award] and the civil penalties authorized or imposed in comparable cases.[211]

But the Court did not explain how the *BMW* factors were to be applied by trial judges and reviewing courts. Because *BMW* was decided before *Gasperini*, despite the reference, quoted above, to abuse of discretion review of district court rulings in *Browning-Ferris*, the *BMW* factors were actually superimposed on a nonexistent procedural framework.[212]

Until recently, the courts of appeals were split on the proper method for reviewing punitive damage awards under the *BMW* factors. Consistent with the approach suggested in *Browning-Ferris*, at least three cir-

206. U.S. CONST. amend. VIII.

207. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 263-64 (1984); *cf.* Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).

208. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 17, 19-24 (1991).

209. U.S. CONST. amend. XIV.

210. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996).

211. *Id.* at 575.

212. *See id.* at 613 (Ginsburg, J., dissenting) ("The Court's readiness to superintend state-court punitive damages awards is all the more puzzling in view of the Court's long-standing reluctance to countenance review, even by courts of appeals, of the size of verdicts returned by juries in federal district court proceedings.").

cuits—the Second,[213] the Seventh,[214] and the Ninth[215]—used an abuse of discretion standard in reviewing rulings made by trial judges assessing punitive damage awards for constitutional excessiveness.[216] Other circuits considered the upper limit as a matter of constitutional law under the *BMW* factors and applied a *de novo* standard of review, giving no deference to the jury or the trial judge.[217]

In *Cooper Industries v. Leatherman Tool Group, Inc.*,[218] the Supreme Court embraced the nondeferential approach by holding that a trial judge's ruling on a motion challenging the amount of a jury's punitive damage award as constitutionally excessive under the *BMW* factors is subject to *de novo* review on appeal. Justice John Paul Stevens' majority opinion instructs the courts of appeals to undertake a thorough and independent review of a trial judge's determination that a punitive damage award is consistent with the *BMW* factors. This instruction appears to reflect the Court's view that *de novo* appellate review of punitive damage awards is necessary to ensure that the *BMW* factors are actually used to test the amount of punitive damages for excessiveness.

Leatherman Tool Group, Inc., sued Cooper Industries, Inc., in the United States District Court for the District of Oregon for violating the trade dress provision of the Lanham Act[219] by copying the Pocket Survival Tool (PST), a multi-function pocket tool manufactured by Leatherman, and marketing the copy.[220] Leatherman also asserted common law claims of unfair competition, passing off, and false advertising.[221] The trial judge submitted all of Leatherman's claims to a jury, which found that the overall appearance of the PST was protectable trade dress, but awarded no damages.[222] The jury also found that Cooper had engaged in unfair competition, passing off, and false advertising, causing Leatherman actual damages[223] in the amount of $50,000.[224] After finding that Cooper's conduct was malicious, the jury also awarded $4.5 million in punitive damages.[225]

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213. *See* Lee v. Edwards, 101 F.3d 805, 808 (2d Cir. 1996).

214. *See* Shea v. Galaxie Lumber & Constr. Co., 152 F.3d 729, 730 (7th Cir. 1998).

215. *See* Pavon v. Swift Transp. Co., 192 F.3d 902, 909 (9th Cir. 1999).

216. *See supra* text accompanying notes 203-05.

217. *See* United Phosphorous Ltd. v. Midland Fumigant, Inc., 205 F.3d 1219, 1229 (10th Cir. 2000); Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc., 181 F.3d 446, 467-470 (3d Cir. 1999), *cert. denied*, 258 U.S. 1076 (2000); United States v. Big D Enters., Inc., 184 F.3d 924, 932-33 (8th Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000); Johansen v. Combustion Eng'g., Inc., 170 F.3d 1320, 1334 (11th Cir. 1999), *cert. denied*, Combustion Eng'g, Inc. v. McGill, 528 U.S. 931 (1999).

218. 532 U.S. 424, 121 S. Ct. 1678 (2001).

219. 15 U.S.C. § 1117 (1994 & Supp. V 1999).

220. Leatherman Tool Group, Inc. v. Cooper Indus., Inc., 199 F.3d 1009 (9th Cir. 1999).

221. *Id.* at 1010.

222. *Id.*

223. *Id.*

224. *Cooper Indus.*, 121 S. Ct. at 1681.

225. *Id.* The jury was instructed to consider the following factors: (1) "The character of the defendant's conduct that is the subject of Leatherman's unfair competition claims;" (2) "The defendant's motive;" (3) "The sum of money that would be required to discourage

Cooper moved for judgment as a matter of law on Leatherman's trade dress claim, arguing that the overall design of the PST was functional, thereby precluding trade dress protection and Cooper's liability under the Lanham Act.[226] The trial judge denied Cooper's motion and, pursuant to the finding of infringement, entered a permanent injunction precluding Cooper from marketing the original copied version of Leatherman's PST.[227]

On appeal, the Ninth Circuit held that the trademark claim failed because the copied product was not entitled to trade dress protection. Accordingly, the copying was lawful and could not support an award of injunctive relief, damages, or attorneys' fees. Nonetheless, the court of appeals held that the evidence of passing off, false advertising, and unfair competition supported the award of actual damages.[228]

Instead of asking the trial judge to grant a new trial unless Leatherman remitted a portion of the punitive damages award, Cooper filed a post-trial motion seeking to reduce the punitive damages award "as a matter of law" on various grounds, including that the award, which was ninety times the amount of purely economic compensatory damages, violated Cooper's due process rights as set forth in *BMW of North America, Inc. v. Gore*.[229] The trial judge denied the motion, finding "that the award 'was proportioned and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to create deterrence to an entity of Cooper's size. . . .'"[230] In an unpublished opinion, the Ninth Circuit affirmed the punitive damages award, expressly held that the district court did not abuse its discretion in refusing to reduce the award, and concluded "that the award did not violate Cooper's due process rights."[231]

In the Supreme Court, Cooper contended that *de novo* review of a trial judge's decision to deny a motion to set aside a jury's damage award is necessary to ensure the functional effectiveness of the Due Process Clause "against wholly irrational awards."[232] Based on *Gasperini*'s embrace of the "upper limit" analysis contained in *Dagnello*, Cooper also argued that *de novo* review does not intrude on any traditional function of the jury under the reexamination clause because it "entails no reexamination of any jury fact findings," only the removal of the part of the award that is "excessive as a matter of law" and which "constitutes unlawful excess."[233] Thus, recognizing that reviewing courts traditionally

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the defendant and others from engaging in such conduct in the future"; and (4) "The defendant's income and assets." *Id.*

226. *Cooper Indus.*, 199 F.3d at 1010-1014.

227. *Id.* at 1010.

228. *Id.*

229. 517 U.S. 559 (1996).

230. *Cooper Indus.*, 121 S. Ct. at 1682 (quoting App. to Pet. for Cert. 3a, judgment. order reported at 205 F.3d 1351 (9th Cir. 1999)).

231. *See id.*

232. *See* Pet. for Cert. at 10, 14.

233. Brief for Petitioner at 10.

have been required to give deference to juries and trial judges except where pure questions of law are involved, Cooper used the *Gasperini* opinion to contend that the issue of constitutional excessiveness is a purely legal question, not a question involving a matter of fact, requiring any deference to juries or to trial judges.

A substantial majority of the justices agreed with Cooper's arguments.[234] Justice Steven's remarkable opinion eliminates the reexamination clause from the judicial equation by determining that "[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, . . . the level of punitive damages is not really a 'fact' 'tried' by the jury."[235] The majority opinion's explanation for this conclusion is a particularly hazy one, amounting to a strained comparison with the use of *de novo* review of trial court rulings imposing constitutionally excessive fines under constitutional criminal penalty jurisprudence, and of trial court rulings in criminal cases about whether "reasonable suspicion" and "probable cause" exist,[236] the Court's blunt assertion[237] that the level of punitive damages is fundamentally unlike the "measure of actual damages suffered, which presents a question of historical or predictive fact,"[238] and the Court's subjective assessment that "juries do not normally engage in . . . a finely tuned exercise of deterrence calibration when awarding punitive damages."[239]

After ruling that the amount of punitive damages is not a fact, or at least not the kind of fact that is protected from appellate reexamination by the Seventh Amendment, a majority of the high Court had little difficulty in rejecting the argument made by Leatherman based on *Gasperini* and *Browning Ferris*, that a superior "institutional competence" of trial judges favors the use of a deferential standard of review.[240]

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234. Justice Stevens delivered the majority opinion in which Chief Justice Rehnquist and Justices Breyer, Kennedy, O'Connor and Souter joined. *Cooper Indus.*, 121 S. Ct. at 1680. Justice Thomas joined in the opinion of the Court, but expressed the view that "the Constitution does not constrain the size of punitive damages awards." *See id.* at 1689. Justice Scalia joined in the Court's judgment, but not its opinion, stating his continuing disagreement with the *BMW* opinion. *See id.* Justice Ginsburg dissented. *Id.* at 1690.

235. *Cooper Indus.*, 121 S. Ct. at 1686.

236. *See* United States v. Bajakajian, 524 U.S. 321, 336-337, n.10 (citing Ornelas v. United States, 517 U.S. 690, 697 (1996)).

237. Ironically, this view is based on language in Justice Scalia's dissent in *Gasperini*. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 457 (1996) (Scalia, J., dissenting).

238. *Cooper Indus.*, 121 S. Ct. at 1686.

239. *Id.* at 1687.

240. *Id.* ("Differences in the institutional competence of trial judges and appellate judges are consistent with our conclusion. In *Gore*, we instructed courts evaluating a punitive damages award's consistency with due process to consider three criteria: (1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Only with respect to the first *Gore* inquiry do the district courts have a somewhat superior vantage over courts of appeals, and even then the advantage exists primarily with respect to issues turning on witness credibility and demeanor. Trial courts and appellate courts seem equally capable of analyzing the second factor. And the third *Gore* criterion, which calls for a broad legal comparison, seems more suited to the expertise of appellate courts. Considerations of institutional competence

The majority opinion does faintly suggest by footnotes that a less opaque determination grounded on "specific findings of fact," including a jury's determination of "the exact amount of punitive damages it determined were necessary to obtain economically optimal deterrence," could possibly render *de novo* review inappropriate, but this suggestion itself reveals the Court's bias that punitive damages awards made by juries are out of control and demand critical attention so that such awards are "tied" "more tightly to the jury's findings of compensatory damages."[241]

Justice Ginsburg dissented from the majority opinion. Invoking *Gasperini* for the twin propositions that "[w]ithin the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for application of [an excessiveness standard]"[242] and, reversal of a trial court's judgment "must be because of an abuse of discretion" because "[t]he very nature of the problem counsels restraint,"[243] the dissent flatly rejects the notion that *Gasperini*'s approach to the review of compensatory damage awards for excessiveness should not be applied to punitive damages awards. Even though an award of punitive damages involves "more than the resolution of matters of historical or predictive fact," Justice Ginsburg accurately explains that the jury's role has not been so limited.[244]

Not surprisingly, the Court's earlier opinion in *Gasperini* proved to be a poor guardian of the jury's role in the litigation process. Once *Gasperini* validated reexamination of the amount of damage awards at the appellate level, treating the issue as a legal question, the use of an abuse of discretion standard of review as an indirect mechanism for ensuring that a reviewing court will conduct a restrained assessment of the size of a verdict has little to recommend it as a matter of principle or logic. Accordingly, Justice Ginsburg's *Gasperini*-based arguments could not overcome the majority's apparent view that the conventional method of submitting and determining the amount of punitive damages is unprincipled and unfair, if not entirely irrational, notwithstanding the trial court's use of jury instructions, which inform the jury of the factors the jury must consider in setting the level of punitive damages.[245]

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therefore fail to tip the balance in favor of deferential appellate review.") (internal citations omitted).

241. *Id.* at 1687 n.12-13 ("[N]othing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such [specific] jury findings [on the particular matters included in the instructions given to the jury on the factors to consider in settling the level of punitive damages]. We express no opinion on the question whether *Gasperini* would govern—and *de novo* review would be inappropriate—if a State were to adopt a scheme that tied the award of punitive damages more tightly to the jury's finding of compensatory damages.") (internal citations omitted).

242. *Id.* at 1690.

243. *Id.*

244. *Id.* at 1691. ("One million dollars' worth of pain and suffering does not exist as a fact in the world any more or less than one million dollars' worth of moral outrage. Both derive their meaning from a set of underlying facts as determined by a jury.").

245. *See supra* note 212.

Fundamentally, *Gasperini*'s flawed assessment that the excessiveness issue is "a question of law," evolves in *Cooper Industries* into a recharacterization of the amount of punitive damages as a legal issue or, at least, an issue that is insufficiently factual to avoid appellate reexamination. This is a dangerous development. The characterization of the issue of excessiveness as a purely legal question has the effect of removing the locus of decision-making away from juries and trial judges and toward appellate courts.[246] It may be thought necessary to do something drastic to curb the perceived tendency of juries to award overly-large punitive damage awards and the apparent perception that trial judges cannot or will not do so.[247] But the more troublesome and dangerous aspect of the majority opinion involves its basic approach to the reexamination issue. Evaluative determinations that are routinely made by juries in garden variety cases are very hard to distinguish from punitive damages awards.[248]

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246. *See, e.g.*, Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 659 (1935) (noting that "asserted insufficiency of the evidence" was characterized as a "question of law to be resolved by the court" in order to reconcile the rendition of judgments as a matter of law with the reexamination clause); *cf.* FED. R. CIV. P. 50(a).

247. Insofar as diversity cases are concerned, the excessiveness problem has been addressed and largely resolved by the states. According to one commentator, forty-six states either have prohibited punitive damages or have enacted legislation aimed at reducing the frequency of punitive damage awards. *See* Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1589 n.61 (1997) (citing Kimberly A. Pace, *The Tax Deductibility of Punitive Damage Payments: Who Should Ultimately Bear the Burden for Corporate Misconduct?*, 47 ALA. L. REV. 825, 843 n.92 (1996) (citing S. Rep. No. 69, 104th Cong., 1st Sess. 57 (1995) (minority views by Sen. Hollings))).

Most state statutes prescribe the purposes behind punitive damages and the circumstances under which damages may be awarded. Many states have changed the burden of proof necessary to obtain a punitive damage award from "a preponderance of the evidence" to "clear and convincing evidence," have capped the amount of the punitive damage award in some manner, and have required the jury to consider particular factors enumerated in the jury charge in fixing the size of the punitive damage award. *See* Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 798-804 (1993) (arguing that the Seventh Amendment should not be interpreted to require that juries assess punitive damages as an initial matter); Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U. L. REV. 153, 171-86 (1999) (arguing that the Seventh Amendment should not be interpreted to require that juries assess punitive damages as an initial matter); Colleen P. Murphy, *Judgment as a Matter of Law on Punitive Damages*, 75 TUL. L. REV. 459, 461 n.10 (2000) (arguing that the Seventh Amendment does not permit outright reduction of such damages).

De novo review of a trial judge's treatment of a jury's verdict would not, however, be troublesome in the least if the legal standard to be applied by a court of appeals gave deference to the jury's role in the litigation process. It is clear, however, that the proponents of *de novo* review have an aggressive, verdict-hostile approach in mind. *See* Paul Mogin, *Why Judges, Not Juries, Should set Punitive Damages*, 65 U. CHI. L. REV. 177, 192-97 (1998) (arguing that the Seventh Amendment does not guarantee a right to jury trial regarding the amount of punitive damages); Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1588-89 (1997). *But see* Colleen P. Murphy, *Judgment as a Matter of Law on Punitive Damages*, 75 TUL. L. REV. 459, 461 (2000) (arguing that no legal rule fixes or can fix a constitutional limit on punitive damages).

248. *See Cooper Indus.*, 121 S. Ct. at 1691 (2001) (Ginsburg J., dissenting).

C. The Reconciliation Dilemma

The Supreme Court has been unwilling or unable to reconcile the Seventh Amendment's reexamination clause with appellate review of jury findings under a weight of the evidence standard. Although there may now be nothing in the Seventh Amendment that precludes appellate review of a trial judge's denial of a motion to set aside a jury verdict as excessive, the articulated basis for this conclusion is that the upper limit is a question of law, not a question of fact about which reasonable minds may differ. This "question of law" approach to reconciliation of weight of the evidence review with the reexamination clause is an unsatisfactory one because it provides no principled restraints on the judicial review of jury findings and gives the wrong guidance to the courts of appeals.

Although the majority opinion in *Cooper Industries* expresses the view that only the level of punitive damages is not a fact, as distinguished from the amount of actual damages and from liability findings, it is very difficult to cabin the Court's solution to the reexamination dilemma—reclassification of a traditional fact question as a legal issue—on any logical basis. It can be anticipated that other evaluative determinations will be challenged on the basis that they do not constitute matters of historical or predictive fact. If these challenges succeed based on a logical extension of the majority opinion's approach to other evaluative determinations or to determinations of the types of mixed questions that are routinely submitted to juries, the right to trial by jury in federal courts will lose most of its current value.

The better approach to this aspect of the problem of appellate review would be either to reject weight of the evidence review at the appellate level as inconsonant with the Seventh Amendment,[249] or to approve a principled version to be used in those few cases in which the jury's liability findings or damage awards are against the clear weight of the evidence and the failure to grant a new trial is manifestly unjust. At the same time, this approach would accommodate remittitur practice when the jury's damage award is excessive as a matter of fact.

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249. In fairness, the historical debate about English trial and appellate practice seems to have been won by the opponents of weight of the evidence review. *See* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 11 Federal Practice & Procedure § 2819 (2d ed. 1995); *see also* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 761 (1957) ("Very few people are deceived into thinking the issue has been transmuted into an issue of law because the appellate court says it is finding only that the trial judge abused his discretion in not finding the clear weight of the evidence to be contrary to the verdict."). *But see* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S. Ct. 1678 (2001) and Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 447-48 (1996) (Stevens J., dissenting).

But it now seems clear that this debate is really not about history. What exactly happened or may have happened in England two centuries ago has little or nothing to do with what is happening or should happen in our federal courts today. *Cf.* Dimick v. Schiedt, 293 U.S. 474, 490-91 (1935) (Stone, J., dissenting, joined by C.J. Hughes, Brandeis, Cardozo, J.J.). Like any trip to Europe, the debate is interesting, but its outcome ought not to determine how the reconciliation dilemma is resolved. Our own precedent and current experience in both federal and state courts is a better guide to the range of available solutions.

No one doubts that weight of the evidence review should be based on the entire record,[250] or that the reviewing court can consider direct evidence and reasonable inferences from the circumstantial evidence in derogation of the verdict.[251] After all, weight of the evidence review does require a weighing of the evidence—a process fundamentally unlike the consideration of motions for judgment or the review of judgments rendered as a matter of law.

Weight of the evidence review can be a useful mechanism in the administration of justice if the reviewing court keeps in mind that it is not "some kind of superjury, from whom losing parties can get a second bite at the apple."[252] Indeed, weight of the evidence review is, in some respects, a matter of attitude.[253] Only if the verdict is against the clear weight of the evidence and an injustice would result from an affirmance of the trial judge's denial of a motion for new trial should a court of appeals reverse and remand the case for a new trial or suggest a remittitur as a condition to the denial of a new trial motion.

The point is that the standards of evidentiary review used by the courts of appeals should be principled legal standards regardless of whether the ruling under review is a judgment as a matter of law or a denial of a motion for new trial. *De novo* review of a trial judge's ruling concerning the sufficiency of the evidence to support a jury finding is not the problem any more than the use of an abuse of discretion standard to review a trial judge's ruling is a solution. Appellate courts routinely exercise *de novo* review in determining whether the trial court's ruling on a motion for judgment as a matter of law was proper. In this context, *de novo* review is designed to ensure that the evidence is viewed in the most favorable light in support of the verdict. *De novo* appellate review of a trial judge's determination that the weight of the evidence supports a verdict or a jury finding also can be conducted in a manner that gives substantial deference to the verdict and respect to the jury's historic role in the litigation process. If the standard of *de novo* review requires the finding to be against the clear weight of the evidence, such that the failure to set aside the verdict, grant a new trial, or to suggest a remittitur to reduce the verdict to the largest number that the evidence will support would be manifestly unjust, *de novo* review can serve as a guardian of the right to trial by jury rather than its enemy.

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250. Dace v. ACF Indus., Inc., 722 F.2d 374, 377 n.5 (8th Cir. 1983).

251. *See, e.g.*, Slatton v. Martin K. Eby Constr. Co., 506 F.2d 505, 508 n.4 (8th Cir. 1974).

252. Sheehan v. Donlen Corp., 173 F.3d 1039, 1047 (7th Cir. 1999) (quoting Knox v. Indiana, 93 F.3d 1327, 1337 (7th Cir. 1996)).

253. *See* Patrick Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEXAS L. REV. 47, 53-60 (1977) ("The jury performs a valuable function by resolving black box, or arbitrary, factual issues and spares the judiciary from engaging in a subterfuge that weakens its credibility with the public. I have also noted that the absence of a jury generally results in a corresponding increase in the role and power of the appellate courts.") *See generally* Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception and Politics of the Civil Jury*, 80 CORNELL L. REV. 325 (1995).

It would be a sad irony if the reexamination clause of the Seventh Amendment caused federal appellate courts to routinely recharacterize questions of fact as law questions to facilitate or justify appellate review. As Professor Wright and others have reasoned, recasting fact questions as law questions is really an obvious subterfuge.[254]

VII. CONCLUSION

Despite the fact that the subject of evidentiary review of jury findings by appellate courts has received scant attention in academic literature, there is probably no single legal subject that is more important to the administration of justice than the standards of judicial review of verdicts, judgments, and other orders based on the sufficiency of the evidence presented at a hearing or trial. This subject is important because it imposes principled constraints on all of the institutional actors who perform the work of deciding cases in the litigation process.

The jury's role in the litigation process demands a disciplined analysis of the record evidence so that the parties' right to have the jury draw reasonable inferences from the evidence is preserved. From *Lavender v. Kurn* through *Reeves*, the Supreme Court has recognized the pivotal role of the jury's right to draw inferences from the evidence. This right cannot be set aside by a reviewing court merely because the reviewers regard a competing inference as equally probable or more convincing. Thus, the academic assertion that a reviewing court must consider all of the evidence in assessing the validity of a jury's verdict is entirely too simple. The two-step evaluative process set forth in *Reeves*, when coupled with the "reasonable minds" standard articulated in *Lavender v. Kurn*, provides a principled mechanism for evidentiary review of verdicts and jury findings to determine whether the verdict or specific finding rests on a reasonable basis.

A reconciliation of appellate evidentiary review of jury findings for factual sufficiency with the reexamination clause requires the application of a principled weight of the evidence standard of review, which is treated as an integral part of the deferential process of appellate review. Unfortunately, with the exception of the Court's enigmatic ruling in *Gasperini* concerning appellate review of a trial judge's denial of a motion for new trial challenging a jury verdict for excessiveness and the Court's even more remarkable holding that the level of punitive damages is not a fact finding protected from *de novo* reexamination on appeal, the Supreme

254. *See* 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2819, at 202-03 (2d ed. 1995) ("This argument is so purely verbal, and its implications for the Seventh Amendment so plainly devastating, that it has been rejected even by those who support appellate review of those orders."); *see also* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 761 (1957) ("Very few people are deceived into thinking the issue has been transmuted into an issue of law because the appellate court says it is finding only that the trial judge abused his discretion in not finding the clear weight of the evidence to be contrary to the verdict.").

Court has been unwilling or unable to reconcile the Seventh Amendment's reexamination clause with appellate review of jury findings under a weight of the evidence standard. Not surprisingly, the courts of appeals, acting more or less in isolation from one another, have developed different review standards while attempting to deal with a common dilemma in a principled manner.

The Supreme Court should revisit *Gasperini* and articulate a general standard of appellate weight of the evidence review that the Court regards as consonant with the reexamination clause. The Court should also reconsider and repudiate the technique of recharacterizing traditional jury questions, which involve the application of the law to the facts, as legal questions. If we are past the point of precluding courts of appeals from reexamining the jury's decisions on some or all of the these "fact" questions, the Court should embrace or craft a generally deferential standard that will allow the courts of appeals to review jury findings and the rulings of trial judges on a principled and disciplined basis under a uniform standard.

Weight of the evidence review, when conducted with the deference that the right to trial by jury demands, serves as a prophylactic against injustice when the clear weight of the evidence makes it plain that a new trial should be conducted. But weight of the evidence review by appellate courts should be limited and conducted in a more uniformly deferential manner, as a proper adjunct to legal sufficiency review, and as a final safeguard against manifestly unjust judgments. That is, weight of the evidence review should not be regarded as an opportunity for a reviewing court to second-guess the jury or trial judges, who are in a much better position to evaluate whether justice requires a new trial than any reviewing court.

If we have lost faith in the ability of the common man to make a reasonable decision in civil cases, we should have the fortitude to say so. Perhaps the reluctance stems from the implications such an admission would have on the other decisions we entrust to ordinary citizens, such as electing our government. The founding fathers' reason for preserving the right to trial by jury is still the best reason for guarding that right today—it protects us from the tyranny, or potential tyranny, of the judiciary, most of whom are legally or practically insulated from public accountability.